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CURRENT EVENTS.

AMERICAN BAR ASSOCIATION.—The special committee of the American Bar Association on the "Delay and Uncertainty in Judicial Administration," in their recent report to the Association embody the following recomendations which, if adopted, would, in their judgment, go far to remove, or certainly alleviate the present prevailing evils in the administration of Justice.

"1. Summary judgment should be allowed upon a negotiable instrument or other obligation to pay a definite sum of money at a definite time, unless an order of a judge be obtained, upon positive affidavit and reasonable notice to the opposite party, allowing a defendant, on terms, to interpose a defense.

2. In an ordinary lawsuit, the methods of procedure should be simple and direct, without a single unnecessary distinction or detail; and whatever can be done out of court, such as the statement of claim and defense, should be in writing and delivered between the parties or their attorneys without waiting for the sitting of a judge.

3. Trials before courts, whether with or without juries, should be shortened, by stricter discipline, closer adhereance to the precise issue, less irrelevant and redundant testimony, fewer debates and no personal altercation.

4. Trials before referees should be limited in duration, by order made at the time of appointment.

5. The record of a trial in every court in which official stenographers are in attendance, should contain short-hand notes of all oral testimony, which notes, if the court shall so order, shall be written out in long-hand and filed with the clerk; but only such parts should be copied and sent to an appellate court as are relevant to the point to be discussed on the appeal, and if more be sent, the party sending it should be made to pay into court a sum fixed by the appellate court by way of penalty.

6. A motion for or against a provisional remedy should be decided within a fixed number of days, and if not so decided, the remedy should fail. In all other cases a decision within a fixed period should be required of every judge and every court, except a court of last resort.

7. The ordering of new trials should be restricted to cases where it is apparent that injustice has been done.

8. Whenever a court of first instance adjourns for a term, leaving unfinished business, the executive should be not only authorized, but required, to commission one or more persons, so many as may be necessary, to act as judges for the time being and finish the business. Such temporary judges should be commissioned in all courts except the court of last resort.

9. The time allowed for appealing should be much shortened. One month, or at most two, should seem to be enough in all cases.

10. Greater attention should be paid to the selection of judges, without which no other reform, however good in itself, can succeed.

11. The statistics of litigation in the courts of the United States and of each State should be collected and published yearly, that the people may know what business has been done and what is waiting to be done.

These recommendations will bear a good deal of tough cogitation and we will not venture to express anything more definite than our first impressions. The first recommendation is liable only to one objection, that the defendant should interpose a defence only "upon terms." What those terms may be is left indefinite. If it means that he shall give security for the debt, it is grossly unreasonable; if, that he shall give security for the costs, it is less so but still unjust. An affidavit that he has a real defence made after notice to his adversary, with a statement of its nature should be sufficient. The second is perhaps all right, but we are not at all clear that as much uncertainty would not be created as cured by the extreme simplicity contemplated by this recommendation. There does not occur to us any reasonable objection to the third, fourth, fifth, sixth or seventh of these recommendation. The eighth, however strikes us as an expedient unworthy of the general reform contemplated by the recommendations. If, as we suppose, the framers

of this scheme of reform contemplate plenary legislative action on the subject, it would be much better to stipulate at once for more regular judges and smaller circuits. The courts should be sufficiently numerous and the terms long enough to dispose of *all* the business without calling into requisition special terms or special judges either. A jury-mast is no doubt a treasure in a tempest, but no man who ever followed the sea would like to trust one where he could help it. So the special or "temporary" judge is a make-shift at best, and, however learned and able as a lawyer, is seldom sufficiently judicial to be as satisfactory as the regular judge, whose mind has been fitted by years of service into its appropriate juridical grooves.

The remaining recommendations call for no particular remark except that the recommendation that "greater attention should be paid to the selection of judges," (in many of the States) will have to be addressed to the political "bosses," and their rule for selecting candidates, for judgeships as will as other offices, proceeds upon principles very different from those which, presumably, control the framers of these recommendations.

CRITICISING JUDGES.—We reprint by request an article entitled "Are judges above criticism," and find no difficulty in answering the question. If ever there was "a divinity that doth hedge a" judge, and secure him against public animadversion, that protection has surely been withdrawn. The privilege is now freely used by the press and the public, of criticising not only the formal and *ex-cathedra dicta* of the courts, but their minor, and incidental rulings and every exercise of that elastic and indefinite power denominated judicial discretion. And this is as it should be. There is no reason why judges should not be held to a responsibility to public opinion not less stringent than that of political officers. Indeed, as judges hold their officers, if not by a life tenure, at least for a long term of years, and as their removal from office can rarely be effected by impeachment or otherwise, and only in cases of flagrant offences, the reason is stronger for their responsibility to public sentiment, than for that of the political officer who must needs face his constituents, within a year, or two, or three, and stand or fall upon the account he can then give of his stewardship.

Of course we will not be understood as saying that judges should be swerved or controlled in their judgments by popular sentiment. On the contrary quite the reverse. They should declare the law, and administer justice irrespective of all outside influences. While their duty in this respect is plain, the right of the public to criticise and discuss their performance of it, is equally clear. In many minor matters however, judicial notice may well be taken of lay criticism. If a judge is too slow, permits unnecessary delays, allows cases to go over from term to term, or if he falls into the opposite error, forces counsel to premature trial of their cases, and thereby produces a plentiful crop of appeals, writs of error and reversals, it is well that his fault should be fully ventilated in newspapers or anywhere else. And if a judge is tyrannical or peevish, or impatient, any one may well say so. In England, lately, a judge upon the bench took exceptions to the conduct of a solicitor, lost his patience, which seems however to have been no very great loss, and fell to scolding like a very Billingsgate fishwoman. The principal legal Journals of London commented in unmeasured terms on the scandalous scene, and in the name of the profession, tendered their sympathy to the aggrieved solicitor. Upon faults such as these, and they are not uncommon, the public may and should comment freely, but if a judge honestly and faithfully strives diligently to do his whole duty, he is entitled to the commendation of the community however distasteful to the feeling or adverse to the interests of the people his rulings may be. The recent proceedings in California against the judges of the Supreme Court of that State, upon which we commented some weeks ago, is a striking illustration of the extremes to which a people may be carried by an adverse ruling on a point of great public interest. Not only was the legislature convened in extra session for the avowed purpose of repealing out of office the Judges who made the obnoxious decision, but charges of imbecility, physical and mental, were preferred against two of the judges in aid of the nefarious project of removing from office, judges confess-

edly upright because they expounded the law the way they understood it. Judges ought to be subject to fair criticism of their official acts, but surely they should hold their offices free from such perils as those which environed the California judges.

NOTES OF RECENT DECISIONS.

DOMESTIC ANIMALS—INJURIES BY—LIABILITY OF OWNER.—In a recent case in New Hampshire,[1] the Supreme court settled a question of some interest as to the liability of an owner of a domestic animal for injuries inflicted by it. The animal in question, a horse, was known by its owner to be vicious, a "notorious kicker," but not otherwise depraved, so far as the information of his owner extended. On one occasion, however, being in harness at the depot, he "reared, squealed," and struck out with his forefoot, very seriously injuring the plaintiff, who brought suit and recovered a verdict in the court below.

The defence was, in effect, that although the defendant was aware of the evil reputation and bad habits of his horse as a kicker, he did not know, nor had he ever heard, that he was otherwise vicious, disposed to bite, or to strike with his forefoot. The court regarded this line of defense as quite thin, and disposed of it in the following language:

"It is not necessary that the vicious acts of a domestic animal, brought to the notice of the owner, should be precisely similar to that upon which the action against him is founded. If it were, there would be no actionable redress for the first injury, of a particular kind, committed by such an animal, because its owner would necessarily be exempt from all liability until it should commit another injury of exactly the same kind. It is enough to say that the law sanctions no such absurdity."

The question in such cases is, whether the notice of the vicious propensities of the animal is sufficient to put the owner on his guard, and require him, as a prudent man, to anticipate and make provisions against such an occurrence. It is not necessary to fasten a liability upon him, that he should have had actual notice of a previous injury of this character. inflicted by the animal. In a New York case,[2] the owner of watch-dogs was held liable for their biting a passer-by, although, so far as the evidence showed, it was their first exploit of that description. In Vermont there is a like ruling,[3] the animal being a bull-terrier, and biting the plaintiff in the public street of the village.

The courts do not seem to make the proper distinction between dogs and other domestic animals. It is the conceded mission of every dog to bite, in proper cases, and his nature is usually in accordance with his mission, but it is not a part of the duty of a horse to kick, in him it is a vice, Hence there is a presumption, in the absence of proof, either way, that a dog *will* bite, and that a horse will not kick, or bite, or strike with his forefoot. The evidence of vice in the horse, therefore, should be stronger to charge the owner with notice and fix his liability than that necessary to charge a like liability on the owner of the dog.

The notice to charge the owner of an animal with liability for its misdeeds, must be notice that he will do the particular thing laid to his charge. Notice that a dog will worry and kill sheep, although the penalty of that canine crime is, everywhere, death without benefit of clergy, will not be held notice that such a culprit will bite people.[4] The rule is, that as soon as the owner of an animal has notice that he is likely to do mischief, he must, at his peril, take care and secure the brute.[5]

It seems, that a *biting* horse is especially obnoxious to the law. In an action in England,[6] Lord Denman held that, whoever knowingly kept an animal accustomed to attack and bite mankind, is *prima facie* liable for damages, and in a Massachusetts case,[7] the ruling was followed. In that case de-

[1] Reynolds v. Hussey, S. C. N. H., July 30, 1886, 5 Atl. Rep. 458.

[2] Rider v. White, 65 N. Y. 54.

[3] Gordeau v. Blood, 52 Vt. 251.

[4] Cooley on Torts, 344; Keightlinger v. Egan, 65 Ill 235.

[5] Cockerham v. Nixon, 11 Ired. 269; Earhart Youngblood, 27 Pa. St. 331; Dolph v. Ferris, 7 Watts & S. 367; Barnes v. Chapin, 4 Allen, 444.

[6] May v. Burdett, 9 Ad. & El. N. R. 101.

[7] Popplewell v. Pierce, 10 Cush. 509.

fendant's horse bit a woman, and the court held that it was sufficient to allege that the defendant knew his horse was accustomed to bite people, and that no allegation of negligence was necessary. And in Pennsylvania, if a horse is permitted to go at large, in the streets of a city, he is liable for such injuries as it may do whether he had, or had not, notice that it would bite or kick.[8]

In an English case,[9] the rulings, as to the liability of the owner of a horse which kicked a child, is a little remarkable. The child was lawfully on the highway, the horse was there too, *unlawfully*. The court conceded that his presence, loose and unattended, upon the public highway, was in violation of the Highway Act, but as there was no evidence that he was vicious, or as to how he came to be on the highway, where he kicked the child, nor was there any evidence of specific negligence on the part of the defendant, the owner of the horse, the court held that the action could not be maintained. It seems to us that the fact that the horse was unlawfully on the highway, a trespasser there, was sufficient evidence of negligence to charge the defendant with the direct consequences of his unlawful presence on the highway. If one horse might kick one child, under such circumstances, why might not a drove of horses, being unlawfully on the highway, run over and trample down half a dozen children?

[8] Goodman v. Gay, 15 Pa. St. 188.
[9] Cox v. Burbridge, 13 C. B. (N. S.) 430.

LIABILITY OF THE PROPERTY OF MARRIED WOMEN ON MECHANIC'S LIEN.

It is always essential to the filing of a mechanic's lien, that the person, whose property is sought to be charged, has made a contract for its improvement. Unless such a contract has been made, there can be no lien. Therefore the liability of a married woman's property to a mechanic's lien depends upon her power to make a contract.

At Common Law.—At common law a married woman's executory contract is not voidable, but void.[1] If, however, her husband is imprisoned for life, or years, or has fled the country, or is exiled,[2] or has never visited this country,[3] or has deserted her and has a residence in another State,[4] or has permanently abandoned his wife,[5] or has renounced his marital rights,[6] then the husband is civilly dead, and the wife can contract as a *femme sole*. Her disability also ceases, when she is permitted to act as a sole trader, as in England by custom of London, and in this country by special legislation.[7] In some States this right is secured by statute without any legal proceedings,[8] while in others there must be a judicial determination of an abandonment.[9]

When Included under the Mechanic's Lien Law.—Unless the mechanic's lien law expressly mentions married women, they are not subject to its provisions. Where the law authorizes a lien, when the owner of property has made a contract for its improvement, this is not held to be an act removing the disabilities under which certain owners of property, such as married women and minors, are incompetent to contract, but merely as referring to contracts valid under existing laws.[10]

Separate Estate of Married Women.—Though a married woman can make no executory contract, which will bind her general estate, yet, under the care of courts of equity she has acquired greater control of property, which has been secured to her as her separate

[1] Copeland v. Kehoe, 67 Ala. 594; Davis v. Smith, 75 Mo. 219; 2 Bla. Com. 293; Bank v. Partee, 99 U. S. 325.
[2] Bank v. Partee, *supra*; Walford v. Duchess de Pienne, 2 Esp. 554; Newsome v. Bowyer, 3 P. Wms. 37; Rhea v. Rhenner, 1 Pet. 105.
[3] Gregory v. Paul, 15 Mass. 31.
[4] Phelps v. Walther, 78 Mo. 320.
[5] Prescott v. Fisher, 22 Ill. 390.
[6] Ayer v. Warren, 47 Me. 217.
[7] Bank v. Partee, *supra*; 3 Burr. 1776.
[8] Black v. Tricker, 59 Pa. St. 13; Conley v. Bentley, 87 Pa. St. 40; Elsey v. McDaniel, 95 Pa. St. 472.
[9] Hannon v. Madden, 10 Bush 664.
[10] Kirby v. Tead, 10 Metc. 149; Rogers v. Phillips, 8 Ark. 366; O'Neil v. Percival, 20 Fla. 937; Fetter v. Wilson, 12 B. Mon. 90; Gray v. Pope, 35 Miss. 116; Sibley v. Casey, 6 Mo. 164; O'Malley v. Coughlin, 3 Tenn. Ch. 431; Warren v. Smith, 44 Tex. 245; *Contra*; Shilling v. Templeton, 66 Ind. 585; Stephenson v. Ballard, 82 Ind. 87. Where the consent of the owner to the erection of a building authorized a lien, it was held, that no contract was necessary, and that a married woman could consent. Husted v. Mathes, 77 N. Y. 388; Gilman v. Disbrow, 45 Conn. 563; Flannery v. Rohrmayer, 46 Conn. 558.

property. Different views are held in the various courts as to her power over such estate. The English rule, which is also held by many courts in this country, is, that she can charge such property, or dispose of it, in any way not forbidden by the conveyance through which she obtains her title.[11] Other courts hold, that she has no power to charge her separate estate, except what the conveyance expressly gives her.[12] Under the latter view of her power, it is very doubtful how far her separate estate can be affected by a suit under the mechanic's lien law. It is generally held, that such a claim is valid against her separate estate, and that by incurring such a debt, she meant to charge such estate—in fact her right to take and hold the property for her separate use authorizes her *ex necessitate rei* to contract for improvements[13]—yet as a sale of the property, to satisfy the judgment of a lien, would be an alienation of the property contrary to the provisions of the conveyance, it cannot be resorted to. The rents and profits can be applied from time to time to the satisfaction of the judgment, which is as far as the English courts would, at one time, go in proceedings against the separate estates of married women.[14] Though it has been held that in such cases there is no liability whatever.[15] Where the more liberal rule as to her power over her separate estate is followed, no reason is seen why the corpus itself should not be sold to satisfy the indebtedness.[16]

Personal Judgment for Deficiency.—Generally these statutes provide for a special judgment against the property, and a general judgment, or a judgment for any deficiency after a sale of the property, against the contractor. In the absence of any statutory provision about married women, a personal judgment against a married woman would be improper and should not be requested.[17] The fact that the mechanic's lien law authorized such a judgment was one of the strongest arguments for holding that the law did not apply to married women.[18]

Contracting Relative to Separate Property through Agent.—A married woman can make no contract relative to her general property even though she join with her husband, unless she is especially authorized to do so by statute,[19] even though she has a separate estate,[20] and is living apart from her husband.[21] As to her separate property, however, she is considered, in many respects, as a *femme sole*, and can act by agent as well as any other property owner.

Husband as Agent.—She can appoint her husband her agent.[22] Since agency may be proved by knowledge of, and assent to, or subsequent ratification of, the acts of the alleged agent, the courts differ very much as to the evidence required to prove that the husband was the authorized agent of his wife, relative to her separate property. His agency cannot be inferred from the marital relation alone,[23] though in Tennessee, by the settled custom of the country, he is considered to represent her in all matters of business.[24] Other courts hold, that the evidence of his agency must be clear, cogent and strong,[25] and more satisfactory than would be required between persons occupying different relations.[26]

[11] Davis v. Smith, 75 Mo. 219; Mauzy v. Mauzy, 79 Va. 537; Radford v. Carwile, 13 W. Va. 572; Racouillet v. Sansevain, 32 Cal. 376; Imlay v. Huntington, 20 Conn. 146; Dale v. Robinson, 51 Vt. 20; Perkins v. Elliott, 23 N. J. Eq. 526; Wadhams v. Am. H. Soc.,12 N. Y. 415; Todd v. Lee, 15 Wis. 365.

[12] Conkling v. Doul, 67 Ill. 355; Cooke v. Husbands, 11 Md. 492; Hardy v. Holly, 84 N. C. 667; Maurer's Appeal, 86 Penn. St. 384; Doty v. Mitchell, 9 S. & M. 435.

[13] Kuhns v. Turney, 87 Pa. St. 497; Germania Sav. Bk's Appeal, 95 Pa. St. 329; Einstein v. Jameson, 95 Pa. St. 403.

[14] Hulme v. Tenant, 1 Bro. C. C. 16; s. c. 1 White & Tudor's Lead. Cas. in Eq. [Hare & Wallace's notes.] Part 2, page 679; Palmer v. Rankins, 30 Ark. 771; Henry v. Blackburn, 32 Ark. 445; Lewis v. Yale, 4 Fla. 418; French v. Waterman, 33 Grat. 617; Charleston L. & M. Co. v. Brockmyer, 18 W. Va. 586; Machir v. Burroughs, 14 Ohio St. 519.

[15] Selph v. Howland, 23 Miss. 264; Gray v. Pope, 35 Miss. 116.

[16] Whitesides v. Cannon, 23 Mo. 457; Yale v. Dedever, 21 Barb. 290; Dale v. Robinson, 51 Vt. 20.

[17] Tucker v. Gest, 46 Mo. 339; Davis v. Smith, 75 Mo. 219; Bradley v. Johnson, 46 N. J. Law 271. See as implying the contrary: Swayne v. Lyon, 67 Pa. St. 436.

[18] O'Neil v. Percival, 20 Fla. 937.

[19] Sexton v. Alberti, 10 Lea (Tenn.) 452.

[20] Marshall v. Rutton, 8 Durnf. & E. 545.

[21] Parker's Ex. v. Lambert's Adm'r, 31 Ala. 89.

[22] Wells v. Smith, 54 Ga. 262; Greenleaf v. Beebe, 80 Ill. 520.

[23] Price v. Seydel, 46 Iowa 696.

[24] Kendell v. Frazer, 9 Heisk. (Tenn.) 727.

[25] Rowell v. Klein, 44 Ind. 290.

[26] Eystra v. Capelle, 61 Mo. 578; McLaren v. Hall, 26 Iowa 297.

When is she Estopped to Deny Husband's Agency?—It has often occurred, that after a mechanic had improved property, and had applied to his employer for his compensation, he then learned that the employer's wife owned the place as her separate property. The courts have tried to prevent the husband from improving his wife out of her estate, and on the other hand to prevent wives from using their separate estates as a means for defrauding mechanics and material men. The husband is not the wife's agent, when she dissents from the proceedings,[27] or does nothing showing her approval,[28] or even consents to the work, and appoves of it, and gives some directions about it, if she has no reason to think the work is being done at her expense, but believes her husband is doing it at his own expense.[29]

On the other hand, where the improvements were made with her knowledge and consent, and she took no step to prevent them, did not disclose her title, and was then enjoying the improvements, it was held, she was estopped to deny that her husband was her authorized agent.[30] Where an insolvent husband used his lumber and his labor on his wife's separate estate, it was held, that his creditors were entitled to the lumber, and the rents and profits of her land should be applied to satisfy that claim, but that they could assert no lien on account of his labor.[31]

Statutory Provisions.—In many States the difficulties on this subject have been removed by statutes expressly subjecting the property of married women to mechanics' liens.

Control of Property by Married Women—Present Status of the Question.—The whole question of the power of married women over property, has been well characterized as a Babel of confusion. While in one place she is the powerless *femme coverte* of a century ago, in another she is as independent of her husband, in all matters relating to her property, as though he were a stranger and she a *femme sole.*[32] It may be said that her liability to mechanics' liens advances *pari passu* with her increasing control of her property.

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[27] Getty v. Framel, [Iowa, filed Oct. 23 1885].

[28] Copeland v. Kehoe, 67 Ala. 594; Myer v Broadwell, 83 Mo. 571.

[29] Copp v. Stewart, 38 Ind. 479; Bickford v. Dane, 58 N. H. 185; Murphy v. Murphy, 15 Mo. Ap. 600.

[30] Schwarts v. Saunders, 46 Ill. 18; Schmidt v. Joseph, 65 Ala. 475.

[31] Hoot v. Sorrell, 11 Ala. 386.

[32] Wells v. Caywood, 3 Colo. 487.

ARE JUDGES ABOVE CRITICISM?

It is a well understood fact, that in this country at least, the just criticism of public officers and servants, is not only the privilege, but the duty, of those who are served. It is claimed by some that the judges of courts, are, or should be, an exception to this rule. That the official acts of the members of Congress, Governors, Legislators, and other officers, are justly subject to review, and comment at the hands of the public press and the individual citizen there can be no question. That these criticisms should be made with sense, decency and propriety, is equally true. That the official acts of the judges of our courts should be exempt from reasonable criticism, we are not prepared to admit, either upon principle or policy. It is claimed that the nature of the judicial office is such, that the decisions of the judges, however erroneous should not only be received with respect, but acquiesed in with good grace, and without comment. It is also said, that the peculiar character of the administration of the law is such, and its technical rules are of such a nature, as to preclude the possibility of intelligent criticism, upon the part of the people, or the public press. While it is true, that the final judgments of courts should be acquiesed in with due regard for the authorities promulgating them, yet we deny that there is anything, either in the judicial office, or in the nature of the subject matter with which it deals, that should exempt it from just and fair criticism at the hands of the people, whose rights and interests are daily submitted to the decisions of these tribunals. We deny that there is anything in the administration of justice with which judges have to do, which is above criticism. It is their duty to declare the equities between man and man, and to secure the parties who are suitors in the courts the just rights to which they are entitled; to see that

crime is punished, and that the innocent are acquitted. These are the objects for which courts were instituted and are maintained. There is nothing in these subjects, which is beyond the comprehension of the intelligent citizen. In fact he is as good a judge as a rule, of what is right, what is equitable, or what is criminal, as the court itself. The rules by which these questions of equity, criminality, and innocence are determined, in courts of justice, it is true, are somewhat technical, and within the peculiar knowledge of the legal profession. That this is so, by no means relieves the courts from accountability, or criticism; if the people and the press, are not able to fully understand the rules by which judicial decisions are reached, they are fully able to understand the justice and wisdom, or injustice and ignorance of the decisions themselves. The editor may not be able to construct a modern Hoe press, but both he and the reader, are competent to criticise the work of that press, whether it is good or bad, although they do not understand the rules, complications, and mechanical devices by which the work was performed.

Legislators reflect, or should reflect the immediate will of the people. Judges declare the sense of mankind on questions before them as understood during a series of years. If they fail to do this, the people and press detect it at once, and it is not only their privilege, but their duty to publicly criticise the judge, and the decision which has thus failed in its purpose. Once admit the doctrine that the decisions of judges, right or wrong, good or bad, are to be received by the public humbly and without comment, and there is at once an end, not only to justice, but to the law itself. The decisions of the judges would speedily degenerate into individual, dogmatic and tyrannical decrees. No human being can safely be trusted to dispose of the most important interests of mankind, under cover of an office which is admitted to be beyond criticism, comment or question.

If there is any office, if there is any work of an officer, which, should always be open to the full light of day, and subject at all times to a fair, just, and open criticism, it is the judicial office, and the judicial decision. In this alone is there safety, by this alone, can we hope for justice, and to even maintain correct rules of law. It is a principle to which there is no exception, that the highest perfection in all the departments of life is only attainable when the results are subject to the criticism, and suggestions of those for whom the work is performed.

When we subject the work of judges to a just, and fair criticism, we not only strengthen and purify the administration of justice, but supply the stimulus upon which alone, improvement is possible.

TREATIES OF EXTRADITION.

Extradition is one of those peculiar subjects, upon which there exists, not only a vast amount of ignorance, but also a vast amount of that which is far more dangerous than ignorance—misconception. In conversation with men of more than average intelligence, and sometimes with men who have enjoyed the advantage of sufficient legal training to render them chary in dogmatic assertion, it will be discovered, in nine cases out of ten, that the views expressed are tinged by a fatal fallacy. In the same way as equity will assume that the thing which ought to be done has been done—this, by the way, is a maxim more honored in the text books than in the Chancery Division, or in the Lincoln's-inn—disputants upon the constantly recurring problems of extradition will constantly assume that there is but one law of extradition obeyed by all the nations which have submitted themselves to it in the view of benefits is to be received and in the interests of the cosmopolitan community. More common still the belief that Spain is a safe asylum for fugitive criminals from this country, and the delusion that there exists no treaty of extradition between the English and Spanish Governments. Both the above-mentioned views are encouraged by the tradition of novelists and of the writers of *euilletons*, who will hardly be grateful for the suggestion that it is safer to omit all allusions to the idea that there exists a general law of extradition, and, when speaking of safe asylums, open to villains proper and to rascally heroes, to transfer the *mise-en-scene* to Portugal.

That there ought to be an international law of extradition, co-extensive with the civilzed

globe, is beyond reasonable question. It would be difficult, indeed, to conceive the mental attitude of the man who would hesitate to accept the *dictum* of M. Georges Lachaud, a well-known advocate in the Court of Appeal at Paris, that "*tous les honnetes gens doivent, par toute la terre, s'unir pour s'entr' aider et se defendre contre les coquins.*" Differences will probably continue to exist upon the exact significance of the word "coquin" in relation to extradition, and these differences will be examined later, but there exists a general consensus of opinion with regard to criminals belonging to certain and distinct classes and the desirability of bringing such offenders within the power of justice. That consensus of opinion tends to become wider and stronger as the pains of exile become weaker, and as the means of travel from place to place become more easy. The world is gradually coming to the belief that "*tout pays qui devient un lieu d'asile pour les criminels se place, par cela seul, au rang des contrees sauvages.*" Commissions have sat and have arrived firmly at the conclusion stated above, which is in truth an inference of the most obvious and simple character; but those who had a clear view of the universal benefit which might be secured by the exercise of mutual consideration on the part of nations, have been prevented from carrying their views into effect by difficulties involved in changes of government, and in the diplomatic relations between various countries. Nowhere in the history of civilization have the perils of delay been more strongly exemplified. For many years the necessity of an international code of extradition has been accepted, but the code has not been introduced; in the meanwhile the critical question concerning the extradition of political offenders has been forced upon the public mind by a series of hideous crimes, *quasi*-political in design, but vulgarly brutal in execution, upon which it cannot but happen that a vast difference of opinion will arise.

Plain facts alone will suffice to demonstrate the absurdity of the relations between different governments on this subject of extradition. Let us take a perjurer for example, and imagine that, foreseeing an imminent prosecution he prefers exile to imprisonment, and sets to work with the view of calculating his chances. He may take it for granted that the comity of nations is a phantom, a fiction of international law of which O'Donovan Rossa, and more particulary Sheridan, are the living contradictions. Portugal is safe, having no treaty of extradition with this country; but Portugal, it may be, offers too narrow a field to his ambition, or he may not like the climate. But the United States of America offer to him a wide territory, an infinite selection of climates, and absolute immunity from justice so long as he obeys the local laws. He has committed neither murder, piracy, arson, robbery, nor forgery; the government of the United States will not allow a finger to be laid upon his person. Austria, under the comprehensive treaty ratified in 1874, will have none of the perjurer; nor, under the treaty of I876, will Belgium refuse to deliver him to the justice which he has outraged. He may go to Brazil if he pleases, or to Denmark, failing a special arrangement between Her Britannic Majesty and His Majesty the King of Denmark. France, by the treaty ratified in 1878, refuses to protect the perjurer, but he may find a safe asylum within the confines of the German Empire. It will be safer for him to avoid Hayti, but he may wander through the Italian picture galleries at will. He must avoid the Duchy of Luxemburg and the Low Countries, and restrain any fanciful desire to visit the Republic of Salvador, Spain is closed to him, Scandinavia is open; Switzerland alone remains, and refuses to protect the perjurer. A more rational tissue of absurdities it would be impossible to conceive. A perjurer is a criminal of varying degrees of baseness, inasmuch as his false swearing may have brought an innocent man to the gallows, or have saved a friend from punishment which may have been unmerited, but there is not a particle of doubt that a perjurer is, above all others, the most dangerous enemy of justice and the most undesirable of immigrants. His presence is as detrimental to the public morality of America as to that of Spain, and it is in the last degree difficult to realise the fact that, there is a difference of practice upon such a matter where there can be no difference of opinion. The case of perjury is extreme and can hardly be called typical; but it is scarcely less ridiculous than that of other crimes, and there can be no question that when men of the future

begin to criticise the growth of the law of nations nothing will appear to them more marvellous than the tardy and irregular growth of the law of extradition.

There remains only that dangerous subject, the political offender, and for the differences which have arisen over his body, not seldom a vile body, the history of Athens is to a great extent responsible. It is agreed on all hands that the greatness of the Athenian State was due largely to the hearty welcome which it extended to political refugees from other States. England has followed the same course, with results tending in two directions; in other words, she has sheltered a number of heroes and an equally large number of consummate rascals. To a certain extent the result has been good, but it has been manifestly inconvenient, and never was this inconvenience more conspicuous than in the case of the Phœnix Park murders. On that occasion, it will be remembered, the miserable tools paid the penalty which they had incurred deservedly, but the principals and authors of the crime escaped absolutely without punishment, because, forsooth, their offence partook of the nature of a political crime. As a matter of fact they were political offenders, because the motive of their offence was political, but they were vulgar murderers, notwithstanding, and their escape, added to their later conduct, has, by rousing the moral sense of the world, dealt something like a death-blow to the principle that, one country is bound not to deliver up to justice those who have conspired against the existing government of another. Kossuth and Mazzini were heroes and we protected them, but having so acted, we cannot complain that Sheridan, Rossa, and Tynan are safe in New York. In short, the principle which prompts us to extend the ægis of protection over purely political offenders, over men with whom we may from time to time sympathise warmly, is noble in theory; but practical men are begining to doubt whether the balance of convenience does not lie with the arguments of those who contend that, every State is capable of dealing with its own subjects, and ought to receive every help in so doing.—[*London Times.*]

MASTER AND SERVANT—NEGLIGENCE—INDEPENDENT CONTRACTOR — NUISANCE.

HEXAMER v. WEBB.

New York Court of Appeals, February 9, 1886.

1. If the owner of a building employs a mechanic to make repairs upon the same with no specific arrangement as to terms and conditions, such employment is in the nature of an independent contract which imposes upon the employe the responsibility incurred by the negligence of himself or those who are aiding him.

2. It is absolutely essential in order to establish a liability against a party for the negligence of others that the relation of master and servant should exist.

3. Where other facts exist which show one to be an independent contractor, the mere fact that no price was fixed for the repairs and no specification made as to the work to be done does not create the relation of master and servant between the parties.

4. Nor does the fact that the work is charged for by the day have the effect of rendering the employer liable for the negligence of the employe.

5. A scaffolding suspended from the eaves of a house near a public street, for the purpose of repairing and improving the building, is not necessarily a nuisance.

6. A city ordinance which prohibits the hanging of any goods, wares, or merchandise or other thing in front of any building at a greater distance than one foot does not prohibit such a scaffolding.

Appeal from a judgment of the Court of Common Pleas for the city and county of New York at general term, affirming a judgment dismissing the complaint in an action for damages for personal injuries. Affirmed.

The case sufficiently appears in the opinion.

Mr. I. T. Williams for appellant.

The workmen, including Burford, were the servants of the defendant. Earle v. Hall, 2 Met. (Mass.) 353; Shearm. & Redf. Neg. § 70.

The work having been done for defendant and upon his premises, of which he was owner and in sole and exclusive possession, the burden of proof that it was done by an independent contractor, if such was the fact, was upon the defendant. Shearm. & Redf. Neg. § 71; Chicago v. Joney, 60 Ill. 383; Arc. Fire Ins. Co. v. Austin, 69 N. Y. 470.

In order to protect the owner from liability the middle man must exercise an independent employment. That is, he must have the right to perform and complete his contract as he may reasonably see fit, to the exclusion of the owner, so that any interference with the doing or completion of the work on the part of the owner would be a breach of the contract under which the work was done representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. Shearm. & Redf. Neg. § 76; Blake v. Ferris, 5 N. Y. 48; Pack Mayor, 8 N. Y. 222; King v. N. Y. Cent. & H. R.

R. R. Co., 66 N. Y. 181; Town of Pierrepont v. Loveless, 72 N. Y. 211.

The ladder or staging suspended under the eaves of this high building directly over the sidewalk, where thousands were passing and repassing, was itself a nuisance. Dygert v. Schenck, 23 Wend. 446; Hart v. Mayor of Albany, 9 Wend. 607; Harlow v. Humiston, 6 Cow. 191; Lansing v. Smith, 8 Cow. 152.

It was sufficient for the plaintiff to prove that in passing along the sidewalk he was injured by this structure, which was appurtenant to the defendant's premises. People v. Mayor, 59 How. Pr. 277; Mayor v. Bailey, 2 Denio, 433-445; Vincent v. Cook, 4 Hun. 320; Whart. Neg. § 187; Robbins v. Chicago, 4 Wall. 657 (71 U. S. bk. 18, L. ed. 427); Storrs v. Utica, 17 N. Y. 104.

In Ellis v. Sheffield Gas Consumers Co., 2 Ellts & B. 767, Lord Campbell said: "It would be monstrous if a party causing another to do a thing were exempted from liability for that act, merely because there was a contract between him and the person immediately causing the act to be done." Congreve v. Morgan, 5 Duer, 495; Creed v. Hartmann, 29 N. Y. 591.

"If, according to previous knowledge and experience, the work which the proprietor engages the contractor to do is likely to lead to mischief, however carefully performed, it will be incumbent on him to foresee such mischief and take precautions against it." 2 Thomp. Neg. 901.

In Moak's Underhill on Torts, it is said, page 277: "When the act undertaken is one from its very character either a nuisance or one dangerous to others, the person undertaking it is not released from responsibility to any person thereby injured, although he has entered into a contract with some person to perform it, and the injury has occurred through the negligence of the latter. Sulzbacher v. Dickie, 51 How. Pr. 500; Glickauf v. Manrer, 75 Ill. 289; Leslie v. Pounds, 4 Taunt 649; Creed v. Hartmann, 29 N. Y. 591; Irvin v. Wood, 4 Rob. 138; 51 N. Y. 224; Wood v. Luscomb, 23 Wis. 287.

The injury complained of resulted from an act which it was absolutely necessary for Burford to do in order to accomplish the desired end, to-wit: the suspending of the ladder or something equivalent. It may therefore be said to have been directed to be done by the defendant. He is therefore liable for an act which he directed to be done even if done by an independent contractor. Water Co. v. Ware, 16 Wall. 566 (83 U. S. bk. 21, L. ed. 485); McCafferty v. S. D. & P. M. R. R. Co. 61 N. Y. 178, 183.

Mr. George S. Hamlin, for respondent.

There was no proof of negligence causing the injury complained of. There is no presumption of negligence in this case from the falling of the plank, because the facts in regard to its falling are all proved.

The facts being all proved, there is no room for presumption. It is for the court to say, upon the facts, whether there is anything to show negligenee.

If verified, the presumption is immediately superseded; if the reverse, it is wholly destroyed. Burrill, Cir. Ev. 36.

For what is the nature of presumptive evidence? It only has the force of evidence while it remains uncontested. Miller v. The Resolution, 2 Dall. 22 (2 U. S. bk. 1, L. ed. 271); Mullen v. St. John, 57 N. Y. 571.

In order to establish negligence, it must be shown that there was an absence of that care which a man of ordinary prudence would have used under the circumstances.

A person is not bound to anticipate remote and improbable contingencies, and it is for the plaintiff to show in such cases what precaution the defendant has failed to take, which he ought to have taken. Shearm. & Redf. Neg. §§ 4, 12; Thomp. Neg. 1234; Harvey v. Dunlop, Hill & Denio, 193; Hartfield v. Roper, 21 Wend. 615; Brown v. Kendall, 6 Cush. 292; Losee v. Buchanan, 51 N. Y. 476; Stuart v. Hawley, 22 Barb. 619; Calkins v. Barger, 44 Barb. 424.

Even if there was evidence of negligence, it was not the negligence, actual or constructive, of the defendant. King v. N. Y. C. & H. R. R. R. Co., 66 N. Y. 184.

When a man is employed in doing a job or piece of work with his own means and his own men, and employs others to help him or to execute the work for him and under his control, he is the superior who is responsible for their conduct, no matter for whom he is doing the work. To attempi to make the primary principal or employer responsible in such cases would be an attempt to push the doctrine of *respondeat superior* beyond the reason on which it is founded. Blake v. Ferris, 5 N. Y. 58; Shearm. & Redf. Neg. § 76; King v. N. Y. C. & H. R. R. R. Co. 66 N. Y. 182; Devlin v. Smith, 89 N. Y. 470; Rapson v. Cubitt, 9 Mees. & W. 710; Erie Co. v. Caulkins, 85 Pa. St. 247.

The fact that such an employe is paid by the day, or that in all the work he consults or defers to the wishes of his employer makes no difference. Shearm. & Redf. Neg. § 77; Corbin v. Am. Mill, 27 Conn. 280: Sadler v. Henlock, 4 El. & Bl. 570; Harrison v. Collins,, 86 Pa. St. 153.

Upon the principal *qui facit per alium facit per se*, the master is responsible for the acts of his servant, and that person is undoubtedly liable who stood in the relation of master to the wrong doer; he who had selected him as his servant from the knowledge of or belief in his care and skill, and who could remove him for misconduct, and whose orders he was bound to receive and obey. Quarman v. Burnett, 6 Mees. & W. 509; Kelly v. Mayor, 11 N. Y. 436; Pack v. Mayor, 8 N. Y. 226.

Another condition to be regarded in the application of the rule of *respondeat superior* is, that there can be but one responsible superior for the

same subordinate at the same time, and in respect to the same transaction. Blake v. Ferris, 5 N. Y. 57; McMullen v. Hoyt, 2 Daly, 271; Laugher v. Pointer, 5 Barn. & Cress. 560; Reedie v. London & Northwestern R. Co. 4 Exch. 244; Hobbitt v. Same, 4 Exch. 257.

The principle is the same in cases where the management of real estate is involved as in other cases of negligence. King v. N. Y. C. & H. R. R. R. Co. 66 N. Y. 181; McCafferty v. S. D. & P. M. R. R. Co. 61 N. Y. 178; Milligan v. Wedge, 12 Ad. & Ell. 737; Rapson v. Cubitt, 9 Mees. & W. 713; Reedie v. London & N. W. R. Co. 4 Exch. 244; Hobbit v. Same, 4 Exch. 257; Mayor v. Bailey, 2 Denio, 433; Hay v. Cohoes Co. 2 N. Y. 159.

This action cannot be maintained on the ground of a nuisance, created, maintained or authorized by the defendant. Dickinson v. Mayor, 92 N. Y. 588; Nolan v. King, 97 N. Y. 571.

It is not pretended that this encroachment prevented the use of the street for its ordinary purposes. It was not, therefore, an obstruction constituting a nuisance. Every encroachment upon a public highway is not a nuisance. Howard v. Robbins, 1 Lans. 65; Peckham v. Henderson, 27 Barb. 207; Griffith v. McCullum, 46 Barb. 561.

Nor are all obstructions in a street nuisances. Commonwealth v. Passmore, 1 Serg. & R. 219; People v. Cunningham, 1 Denio, 533; Nolan v. King, 97 N. Y. 571; Davis v. Mayor, 14 N. Y. 524; Reedie v. London & N. W. R. Co. 4 Exch. 244.

An act does not become a nuisance merely because it is within the prohibition of a city ordinance, when it is otherwise lawful.

The ordinance of the city is a police regulation but is not of itself sufficient to give a cause of action to a party injured by an act in violation of its terms. Moore v. Gadsden, 93 N. Y. 17; Knupfle v. Knickerbocker Ice Co. 84 N. Y. 491; Massoth v. Del. & H. C. Co. 64 N. Y. 532; McGrath v. N. Y. C. & H. R. R. R. Co. 63 N. Y. 531.

Where a party is bound by the act of his agent, and the declarations of the agent qualify or affect that act, these declarations may be proved against the principal, but they are not proved as admissions or declarations merely, but as part of the *res gestæ*. The act and the work together make the whole thing to be proved. Thallhimer v. Brinckerhoff, 4 Wend. 397; Luby v. H. R. R. R. Co. 17 N.Y. 133; Baptist Ch. v. Brooklyn Fire Ins. Co. 28 N. Y. 160; Fairlie v. Hastings, 10 Ves. 123; Greenl. Ev. §§ 113, 114.

MILLER, J., delivered the opinion of the court.

This action was brought by the plaintiff to recover damages alleged to have been sustained by means of the negligence of defendant's agents and servants in making repairs and improvements upon the hotel of the defendant situated in the city of New York.

The alleged negligence consisted in fixing and securing the staging used in performing the work; and the proof showed that the ladder used as a scaffold, was suspended from the roof over the eaves of the hotel, and upon it were placed planks which were used as a platform upon which the workmen employed stood to do the work. This scaffold was moved from time to time around the bay windows from place to place. A heavy wind was blowing and while shifting the ladder a gust came and the working of the wind and the grating against the cornice and wall cut the rope which held the planks on the ladder, and the wind turned the planks up so that they fell, and one of them in falling to the sidewalk bounded and struck the plaintiff. One, Burford, who was engaged in the roofing and cornice business, was employed by the defendant to do the work which was intended to obviate a difficulty caused by pigeons making their nests under the eaves of the roof of the hotel. At the close of the testimony a motion was made to dismiss the complaint upon the ground, among others, that if there was proof of negligence it was not the negligence of the defendant or his agents or servants, but of an independent contractor; and the plaintiff's counsel then asked to go to the jury upon several grounds which were stated and refused, and the motion to dismiss the complaint was granted; and the defendant's counsel excepted to the decision of the court.

The employment of Burford was of a general character and the contract between him and the defendant was not restricted as to time or amount or the specific services which were to be rendered. The accident occurred while Burford and his men were engaged in the performance of this work; and this action was sought to be maintained, upon the ground that the workmen employed, including Burford, were the servants of the defendant, and that the defendant as owner of the real estate was responsible to third persons for the carelessness, negligence, or want of skill in those who were carrying on or conducting the business; and this whether the persons employed were working for wages or on contract. We think that the principle laid down has no application to the facts presented in the case at bar. As a general rule where a person is employed to perform a certain kind of work in the nature of repairs or improvements to a building, by the owner thereof, which requires the exercise of skill and judgment as a mechanic, the execution of which is left entirely to his discretion with no restriction as to its exercise and no limitation as to the authority conferred in respect to the same and no provision is especially made as to the time in which the work is to be done or as to the payment for the services rendered and the compensation is dependent upon the value thereof, such person does not occupy the relation of a servant under the control of the master, but he is an independent contractor and the owner is not liable for his acts or the acts of his workmen who are negligent and the cause of injury to another. If the owner of a building employs a mechanic to make repairs upon the same without any specific arrangement as to terms and conditions, such employment is in the nature of

an independent contract which imposes upon the employe the responsibility incurred by acts of negligence caused by himself or those who are aiding him in the performance of the work.

It is absolutely essential in order to establish a liability against a party for the negligence of others, that the relation of master and servant should exist. In King v. N. Y. C. & H. R. R. R. Co., 66 N. Y. 184, the rule applicable to such a case is laid down by Andrews, J., as follows:

"It is not enough in order to establish the liability of one person for the negligence of another, to show that the person whose negligence caused the injury was, at the time, acting under an employment by the person who is sought to be charged. It must be shown, in addition, that the employment created the relation of master and servant between them. Unless the relation of master and servant exists, the law will not impute to one person the negligent act of another."

In the case considered, we think that by the contract between the defendant and Burford the relation of master and servant was not created. Burford was a mechanic, engaged in a particular kind of business which qualified him for the performance of the work which he was employed to do. By the arrangement with the defendant, he was an independent contractor, engaged to perform the work in question. He was employed to accomplish a particular object by obviating the difficulty which he sought to remove. The mode and manner in which it was to be done and the means to be employed in its accomplishment, were left entirely to his skill and judgment. Everything connected with the work was wholly under his direction and control. No right was reserved to the defendant to interfere with Burford or the conduct of the work. It was the result which was to be attained that was provided for by the contract without any particular method or means by which it was to be accomplished. So long as the contractor did the work, the defendant had no right to interfere with his way of doing it.

The fact that no price was fixed and no specification made, as to the work to be done, did not render the contract one of mere hire and service, or create the relation of master and servant between the parties. It cannot, we think, be said that Burford did not agree to do the work required of him and that no contract was made because, after the subject matter had been considered and talked about, and the difficulties attending the work, Burford said he would try and do something, and the defendant replied he didn't care how he did it. The conversation had amounted in law to an agreement that Burford would perform all the work that was required of him according to his own judgment as to what was necessary to be done to accomplish the object intended. He was an independent contractor, and the men employed by him were his servants and had nothing to do with the defendant. Burford was not the agent of the defendant in any sense, in purchasing the material or in hiring the men to do the work.

That the work was charged for by the day could make no difference and did not alter the position which Burford occupied, in reference to the defendant, as an independent contractor. It did not give the defendant control over the job, nor authority to hire or discharge the men, nor render him in any way liable to them instead of Burford. It is very evident that the men employed were the servants of Burford and, therefore, the defendant cannot be made responsible for their negligence.

The test to determine whether one who renders service to another, does so as a contractor or not is to ascertain whether he renders the service in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as to them eans by which it is accomplished. Shearm. & Redf. Negligence, § 76.

In Blake v. Ferris, 5 N. Y. 58, within the rule last stated, it is held that when a man is employed in doing a job or piece of work with his own men, and employs others to help him or to execute the work, for him and under his control, he is the superior who is responsible for their conduct, no matter for whom he is doing the work. To attempt to make the primary principal or employer responsible in such cases would be an attempt to push the doctrine of *respondeat superior* beyond the reason on which it is founded. Upon these authorities there would seem to be no ques ion as to the character of Burford's employment.

We are referred by the learned counsel for the appellant to numerous authorities as upholding the doctrine that Burford was not engaged in an independent employment. and that the defendant was, therefore, liable. After a careful examination, we are satisfied that none of them sustain this position. Those cited from this State are certainly in a contrary direction. The other cases cited, are clearly distinguishable from the case at bar and establish no rule adverse to that which is supported, as we have seen, by the authorities in this State.

The claim, that the ladder or scaffold suspended under the eaves of the hotel was a nuisance, is not well founded. The proof on the trial did not show that the building was on the line of the street. It did show that the hotel was separated from the sidewalk by an area of fifteen feet. Without further proof it is difficult to see how the ladder or staging could be regarded as such an obstruction to the street as to constitute a nuisance. The action is based upon the ground of negligence, and there is nothing in the complaint alleging that the scaffold was suspended over the sidewalk, or was in any respect an obstruction to the street. The gist of the action is negligence and unskillfulness in the construction of the scaffolding.

It may be added that the scaffold itself was

suspended for a legitimate purpose connected with the reparation and improvement of the building. It was not necessarily injurious and dangerous, nor an obstruction on the street, and if properly used might well be employed for the purpose intended. It could only become dangerous by being improperly constructed or by some wrongful and willful act. In view of all the facts it cannot, we think, be maintained that the scaffold necessarily was a nuisance.

The claim that the ladder was suspended in violation of the city ordinance is not well founded. The ordinance referred to prohibits the hanging of any goods, wares or merchandise or any other thing in front of any building at a greater distance than one foot. The ordinance was aimed against the obstruction of the streets. It is not apparent that the ladder overhung the street; but even if such was the case it was a mere temporary structure, erected for the purpose of repairing the building, and not an obstruction within the meaning and spirit of the ordinance, which it is manifest was directed against goods, etc., which were exposed for sale or for the purpose of attracting public attention thereto. The construction contended for would prevent the use of scaffolds in the reparation of buildings which never could have been intended.

It is also insisted that the work in question was intrinsically dangerous, and hence the party authorizing it would be liable whether he did the work himself or let it out on contract. The answer to this position is that the work itself was not necessarily injurious or dangerous. It was merely necessary repairs or improvements for the benefit of the building which, under ordinary circumstances, could be made without any serious results. The accident was caused by a gust of wind, which might well occur in the performance of any work of a similar character, and which could not well be guarded against or provided for. The act itself could only become dangerous and cause injury by some unforseen circumstance, and the rule stated is not applicable.

There is, we think, no force in the position that the injury complained of was the result of an act absolutely necessary for the contractor to do, in order to accomplish the desired end; and the suspending of the ladder may, therefore, be said to have been done by the defendant, and he is liable, although it was done by an independent contractor.

It is apparent, from the evidence, that the injury resulted, not from anything contracted for by the defendant, but something collateral thereto. The defendant's contract related to the improvement of the building alone. What was necessary to be done for that purpose and the manner in which it should be done rested with the skill and judgment of the contractor. The defendant was absent at the time and had no knowledge of what was done or the manner in which it was done. The doing of the work and the mode in which it was to be accomplished were matters collateral to the contract between the defendant and Burford. For these the defendant could not be held responsible.

After a careful consideration of the questions presented it follows that no error was committed by the judge in dismissing the complaint, nor in his refusal to allow the case to go to the jury; nor did he err upon the trial in striking out the testimony given, as to the declaration of one of the witnesses sworn upon the trial.

The judgment should be affirmed.

All concur.

NOTE.—There is no conflict of authority upon the subject of the case, and a note need only set forth the application of its principles by the latest decisions.

The difference between a servant and one in an independent employment may be made clearer by one or two definitions.

A servant is "a person hired by another to work for him as he may direct."[1]

A contractor is one who, in the pursuit of an independent business, undertakes to do specific jobs of work for others without submitting himself to their control in respect to all the petty details of the work.[2]

Or by the definition or description used by Mercur, C. J.: "When one renders service in the course of an occupation, representing the will of the employer only as to the result of the work and not as to the means by which it is accomplished, it is an independent employment."[3]

Though the rule is clear enough, there is no universal and unfailing criterion as to when it applies. The tests usually relied upon are: In whom is the right (1) of selecting, (2) of discharging, (3) of directing workmen, and (4) is the employer concerned only in the ultimate result, but not in the details of the work?[4]

But the fact that the party sought to be charged pays the hands is not decisive. Where the defendant, [a contractor to paint a church,] gave out the work of frescoing to a sub-contractor, and lent to the sub-contractor, who was also a scaffold-builder, two men to put up a scaffolding, these hands still being paid by the defendant, it was ruled that the defendant was not liable for a injury caused by faulty construction of the scaffold. Although paid by the defendant the hands built this scaffold entirely under the direction of the sub-contractor.[5]

Nor is it decisive that the party sought to be charged furnishes material.[6]

The employer may, further, retain a certain measure of control of the work without rendering him liable for his contractor's fault, if only the cause of action did not arise out of the employer's control. Examples are often to be found in cases of railroad construction. A control of this kind, provided that if the contractor did not employ men and tools according to the requirements of the company's engineer, the contract might be annulled. It was held, that the company could only by this provision enforce the doing of

1 Parsons on Contracts, 101.

2 Shearman & Redfield on Negligence, § 76.

3 Harrison v. Collins, 86 Penna. St., 153.

4 Railroad v. Norwood, 62 Miss. 565; as to right of selection, Boswell v. Laird, 8 Cal. 469.

5 Ditberner v. Rogers, 66 How. Pr. (N. Y.) 35; Devlin v. Smith, 89 N. Y. 470.

6 Charge of Welker, J. Fuller v. Bank, 15 Fed. Rep. 875.

the work, not control its manner of performance so to be answerable for injury done by the contractor's operations to adjoining land. In a second case, the work was to be done "according to specifications and agreeably to the directions of the (company's) engineer," "earth excavations to be hauled into embankments as far as the engineer directs."

Suit was brought by one over whose land the contractor had dumped waste dirt. The decision was that the contract did not give the company control over the particular act complained of, and in relation to other clauses of the contract, too long to be put down here, the rule was laid down that a right to direct the amount of work is not identical with a right to prescribe the mode of operation.[7]

On the other hand, where a contract was to take down a house "carefully, and under direction and subject to approval" of the owners, who, it appeared were present and gave directions almost daily, the owners were held liable as masters.[8]

The question of independent employment, then, is ruled largely by the circumstances of the case, and the actual intention of the parties.

There is one set of cases to which the strict rule of master and servant applies, as it is said, with uniformity of decision, where personal property is hired out, and with it a servant of the owner to manage it; the contract is said to be, not with the servant, but with the owner of the property, the owner who has lent or hired out his servant still has control over the doer, and, constructively, over the doing of the work.

Cases of this kind may occur where a railroad company supplies its contractor for building the road with a construction train and hands to run it, the train and the men to be entirely under control of the contractor except, perhaps, as to a maximum rate of speed, and the keeping out of the way of regular trains.

Here the company is liable for injury done by the train.[9]

Another example is that of a workman in the employ of a stevedore, who was injured by the carelessness of the engineer lent by defendants to the stevedore along with their engine.[10]

On the question of nuisance, also the principal case accords with the authorities. A municipality may, in cases justified by necessity or custom, as for instance, laying of pipes, building, and the like, permit the highway to be occupied by private individuals to an extent which but for this permission would amount to a nuisance; and in such cases the owner is not answerable for his contractor's neglect. So, also, although the work requires some labor or some engine in its nature hazardous; provided, however, that this dangerous work may, by using proper care be done with safety, and has then the sanction of custom or regulation; and that the contract contemplates only such careful use. The presumption is, the owner intended the work to be done properly and carefully.[11]

CHARLES CHAUNCEY SAVAGE.

Philadelphia.

7 Burmeister v. R. R. 47 N. Y. S. C. 264; Hughes v. C. & S. Ry. 39 Ohio St. 461.

8 Linnehan v. Rollins, 137 Mass. 123.

9 Railroad v. Norwood, 62 Miss. 565; Burton v. Railroad, 61 Texas, 526.

10 Coyle v. Pierrepont, 37 Hun. (N. Y.) 379; reversing same case, 33 Hun. (N. Y.) 311.

11 Smith v. Simmons, 103 Penna. St. 32; Martin v. Tribune Assn,, 30 Hun. 391; Lawrence v. Shipman, 39 Conn., 587; (Seymour, J. sitting as arbitrator.) Aston v. Nolan, 63 Cal. 269; Bailey v. Railroad, 57 Vt. 252.

CRIMINAL LAW—JURISDICTION OF CRIME.

STATE v. SHAEFFER.

Supreme Court of Missouri, June 21, 1886.

1. *Jurisdiction—Where Crime Consummated*—Where a defendant obtains money by false pretence by means of a sight draft drawn by him in Kansas City, Mo., on a New York bank, and sent by a Kansas City bank, in which it was deposited, for collection to the New York bank, and by it collected and the amount forwarded to the Kansas City bank where the defendant receives the money, the crime is consummated in New York.

2. *Instruction—Reasonable Doubt—Preponderance of Evidence*—An instruction explaining what is meant by a reasonable doubt, which declares that "if all facts and circumstances proven can be as reasonably reconciled with the theory that the defendant is innocent as with the theory that he is guilty," is improperly given, as this directs a verdict upon a mere preponderance of evidence.

Appeal from Jackson County criminal Court.

Messrs. J. V. C. Karnes and *John W. Beebe*, attorneys for Schaeffer; and *B. G. Boone*, Attorney General, and *F. W. Walker*, for the State.

The facts are stated in the opinion of the court.

HENRY, C. J., delivered the opinion of the court:

The defendant was indicted by the grand jury in the criminal court of Jackson county, at the May term, 1885. The following are the charges:

The first count charges that the defendant obtained a large amount of money from John I. Blair under false pretenses, the false pretenses consisting of representations, to Blair, that he, the defendant, had arranged with the heirs of one Anthony to purchase of them for Blair, their interest in a certain tract of land lying in Jackson county, near Kansas City, and that Blair was to have the land at the lowest price at which it could be obtained, when in fact he purchased it at one price and represented to Blair that he paid a larger sum, and on the foregoing representations obtained from Blair more than the defendant paid to Anthony's heirs.

The second count charged that the defendant was the agent of said Blair, and, as such, received into his possession a large sum of money, which which he feloniously converted to his own use. It is not necessary to give any other attention to these two counts, the trial court having, by instruction, withdrawn from the jury all consideration of those counts, confining their inquiry to the charges in the third count, which is as follows:

"And the grand jurors aforesaid, upon their oaths as aforesaid, do further say and present that Samuel C. Shaeffer, at the county of Jackson, in the State of Missouri, on the ——day of February, 1884, did unlawfully and feloniously obtain, from one John I. Blair, the sum of $7,650, lawful money of the value of $7,650 of goods, chattels, moneys and property of the said John I. Blair, by means and by use of a cheat and a fraud, and a

false and fraudulent representation and false pretense, and false instrument and statement with the intent him, the said John I. Blair, then and there feloniously to cheat and defraud, contrary to the form of the statutes, and against the peace and dignity of the State."

On this count the jury found him guilty, and assessed his punishment at imprisonment in the penetentiary for a term of eight years, and defendant has prosecuted his appeal.

The evidence of the State tended to prove that the defendant made representations to Blair to the effect that he had agreed to pay to the Anthony heirs for their interest in a tract of land near Kansas City, $8,450, having, in fact, purchased the same at the price of $800.

The agreement between Blair and defendant in relation to the interest of the Anthony heirs in the tract was, that Blair would place the money to make that purchase to defendant's credit in such bank at Kansas City as defendant might suggest by telegraph, or that he would pay defendant's draft at sight, National Park Bank, New York.

It appears that defendant telegraphed Blair February 12, 1884, that he had drawn on him for $19,668.83, which sum included the $8,450 for the Anthony heirs. The draft read as follows:

"19,668.33. KANSAS CITY, MO., Feb. 12, 1884.

"At sight, pay to the order of myself, nineteen thousand, six hundred and sixty-eight dollars and thirty-three hundredth dollars, with exchange, value received, and charge to account of

JOHN I. BLAIR.

"To Park National Bank, New York City.

"S. C. SHAEFFER."

This was indorsed by Shaeffer to the Traders Bank of Kansas City, which sent it for collection to the United States National bank, New York, which collected it and placed it to the credit of the Traders' bank of Kansas City, which, after informed of the payment of the draft in New York, paid the amount to Shaeffer, at Kansas City.

On this state of facts, the question arises, where was the offense with which the defendant is charged committed?

It is no crime to make use of false pretenses, unless, by means of such pretenses, the party making them obtains money, or property from another to which he had no right. And the crime is consummated where the money or property is received. Commonwealth v. Troyl, Met. (Ky.) 1; State v. House, 58 Ind. 466; Stewart v. Jessup, 51 Ind. 415. In the latter case, the substantial facts were that one Kerr, relying upon false representatives of Stewart, sold the latter, twelve horses, which Kerr had shipped to New York, where Stewart got possession of them; Stewart was arrested in Indiana on the charge of obtaining the horses by false pretenses, and, on a preliminary examination before a justice of the peace, was adjudged guilty and required to give security in the sum of $3,000 for his appearance in the circuit court to answer the charge. Stewart, not having given the security, was committed to jail, and upon a writ of *habeas corpus* was brought before the circuit court of Hamilton county, and on appeal to the Supreme Court of the State from a judgment of the circuit court against him, the Supreme Court reversed the judgment, holding that the crime was not committed in Indiana, where the false representations were made, but in the State of New York, where the property was received. Numerous decisions of that court to the same effect are cited in the opinion. Norris v. State of Ohio (25 Ohio State, 217), is also a case analagous to the case at bar. The defendant was a resident of Clark county and, by fraudulent representations as to his solvency, in a letter, he induced the Akron Sewer Pipe Company, located in Summit county, to ship him by rail to Clark county a lot of sewer pipe. He was indicted in Clark county, but the Supreme Court held that the crime was committed in Summit, and remarked that "the weight of authority is clear that the railroad company was the agent of defendant for receiving the goods for him at Akron and carrying them to Springfield, and the delivery to it by the sewer pipe company was, in legal contemplation, a delivery of the goods to the defendant at Akron."

So in the People v. Sully, 5 Parke's Com. Ref. 145), defendant was indicted in Buffalo, Erie county, he having obtained by false pretense in Buffalo, a check drawn on a bank in Batana, Genesee county. The indictment was for obtaining the signature to the check, and it was held that he was properly indicted in that county, but the court said: "It is not material where the pretenses were made. The obtaining the signature or property by means of them, with intent to cheat and defraud, completes the crime and determines the place of trial." And further remarked the court: "The prisoner could not have been convicted on the first count for obtaining the money through, or by means of the check, for the money was obtained at Batana, without the territorial jurisdiction of the court."

So in State v. Wychoff, 31 N. J. 68, the general proposition is asserted that a crime is to be tried in the place in which the criminal act has been committed. It is not sufficient that part of such acts shall have been done in such place, but it is the completed act alone which gives jurisdiction."

In the State v. Dennis, 80 Mo. 594, the defendant was indicted for obtaining, by false pretenses, a lot of mules, and the question was whether he had received the mules in Randolph county or in the city of St. Louis In delivering the opinion of the court Judge Norton said: "It is, however, earnestly insisted by counsel that, if any offense was committed, the evidence shows that it was committed in the city of St. Louis and not in Randolph county, and that the demurrer to the evidence should have been sustained on the ground that the Moberly court of common pleas, of Randolph county, had no jurisdiction. If the pre-

mises assumed be well founded, the legal conclusion drawn from them is undoubtedly correct." The judgment was affirmed, the majority of the court holding that the mules were received by defendant in Randolph county. I dissented, believing that the evidence established the reception of the mules in the city of St. Louis.

We entertained no doubt that the place where the money or goods are obtained, without regard to where the representations were made, is the place where the party should be prosecuted.

Where did Blair pay the money? Where did he lose his property in the money and his dominion over it? If he deposited it in the Park National bank to the credit of Shaeffer, that was a payment in New York to Shaeffer. If he had money on deposit to his own credit, and directed the bank to pay it on Shaeffer's check or draft, then, when so paid in New York, whether on Shaeffer's check or draft, he then parted with his money. The United States National bank was the agent of the Traders bank at Kansas City, which was unquestionably the agent of Shaeffer. Neither of those banks were, in any sense, the agent of Blair. But whether the United States National bank is to be considered as the agent of Shaeffer, or the agent of the Traders bank, is wholly immaterial, since it is clear that it was not the agent of Blair, or of the National Park bank, after the National Park bank paid the money in the United States National bank. Blair's obligation to pay the money was discharged, and if that bank had become insolvent, or failed to account for the proceeds of the check to the Traders bank, Shaeffer could have had no recourse upon Blair. The Traders bank received the draft for collection for Shaeffer's accommodation, and paid him the amount of the draft only on the assurance from its correspondent in New York that the Park bank had paid the draft; that the Traders bank then paid the amount of the draft to Shaeffer was not a payment by Blair. But the substance of the transaction was the collection of the money in New York from Blair, and a disposition in Kansas City by Shaeffer of that money so colleeted in New York. If instead of receiving the money, Shaeffer had received property in Kansas City from the Traders bank, instead of the money, the principle applicable would have been the same. The Traders bank paid Shaeffer its money, not Blair's. The United States National bank held the money sent, not as Blair's money but really as Shaeffer's, though nominally as the money of the Traders bank, and the transfer of the draft to the Traders bank by Shaeffer, operated to transfer the proceeds of the draft to the Traders bank when paid by the Park National bank to the United States National bank. A merchant in New York who draws a draft on a customer in St. Louis, which is paid by the latter to the bank in St. Louis, to which the draft is sent for collection, does not thereby pay the money in New York but in St. Louis, and that the New York merchant indorses it for collection to a bank in New York and secures the money in New York from that bank after the latter has notice of the payment of the draft in St. Louis to its correspondent there, does not make the payment by his customer to the bank in St. Louis a payment of the money to the New York merchant in New York. There are other important questions in this case, which it is not thought necessary to determine, in as much as holding that the crime was not committed in Jackson county, and that the criminal court of that county had no jurisdiction of the cause, the judgmust be reversed and the accused discharged. There is, however, one instruction given by the court for the State, upon which it is thought best to express our views. It is as follows: Sixth—"In law a party accused of crime is presumed to be innocent, until the contrary is proven beyond a reasonable doubt. If, therefore, upon a consideration of all the evidence in this cause you entertain a reasonable doubt as to the guilt of the defendant, you will give him the benefit of such a doubt and find him not guilty. In applying the rule as to reasonable doubt, you will be required to acquit, if all the facts and circumstances proven, can be reasonably reconciled with any other theory than that the defendant is guilty; or, to express the same idea in another form, if all the facts and circumstances proven before you, can be as reasonably reconciled with the theory that the defendant is innocent, as with the theory that he is guilty, you must adopt the theory most favorable to the defendant, and return a verdict finding him not guilty. You will observe, however, that the doubt to authorize an acquittal on that ground alone, must, as stated, be reasonable, and it must be also as one fairly deducible from the evidence considered as a whole. The mere possibility that the defendant may be innocent will not authorize an acquittal." "It declares very properly" that "one accused of crime is pronounced to be innocent until the contrary is proven beyond a reasonable doubt. If, therefore, upon a consideration of all the evidence in this case, you entertain a reasonable doubt of the guilt of the defendant you will give him the benefit of such doubt, and find him not guilty," but then proceed to explain what is meant by a reasonable doubt as follows:

"In applying the rule as to reasonable doubt, you will be required to acquit, if all the facts and circumstances proven, can be as reasonably reconciled with the theory that the defendant is innocent, as with the theory that he is guilty, you must accept the theory most favorable to the defendant, and render a verdict finding him not guilty." This attempted explanation of the term "reasonable doubt" would eliminate it from the criminal code, and leave juries to find verdicts in criminal cases upon the mere preponderance of the evidence.

By that explanation, the benefit of a reasonable doubt in criminal cases is no more than the advantage a defendant has in a civil case. The doc-

trine expressed in the explanation is exactly that which is applicable in a civil action, in which if the facts proven, can be as reasonably reconciled with the theory that the defendant owns what he is sued for, as that he does not, the defendant is entitled to a verdict. The plaintiff must make out his case, and if the evidence is evenly balanced he cannot recover. But for the explanation of what was meant by reasonable doubt, the instruction correctly declares the law, and why that should have been injected into the instruction is inconceivable.

The instruction in regard to reasonable doubt approved in State v. Newshin, 20 Mo. 111, has been repeatedly sanctioned by this court. Juries understand it. The bench and bar are familiar with it, and it is not safe to depart from it, in efforts to make clear what is now well understood.

This case illustrates the danger of such experiments. Here the said matter introduced into the instruction vitiated it, and if for nothing else, the judgment would have been reversed for that error. As long as this court adheres to what it has ruled, especially in criminal cases, it is the better and safer practice for trial courts to be guided by its rulings. The judgment is reversed, and the prisoner discharged.

Following is Judge Norton's concurring opinion in the above case:

"I place my concurrence in reviewing the judgment in this case, not only on the ground so clearly stated in the opinion of the court, but on the further ground that the misrepresentations made by the defendant, if made as disclosed in the evidence, and for which it is sought to make him criminally liable, having been made in the progress of a long, real — not bogus — business transaction, are not embraced in the class of offenses against which section 1561, revised statutes, is directed. In what is here said, Judge Ray concurs with me.

NOTE.—The law deems that a crime is committed in the place where the criminal act takes effect. Hence, in many circumstances, one becomes liable to punishment in a particular jurisdiction while his personal presence is elsewhere. Even in this way he may commit an offense against a State or country upon whose soil he never set his foot. Thus, where a person who puts forth a letter making a false pretense to a person who thereupon parts with his goods in the county where he receives it, he may be indicted in the county to which it is sent, though he does not go there himself.[1]

In People v. Adams,[2] the intent to cheat and defraud were virtually conceded, and the alleged criminal acts were expressly admitted to have been committed by the defendant in the City of New York, through the instrumentality of innocent agents, the defendant at the time being in the State of Ohio. As there was no question raised as to the form of the indictment or plea, the only point presented to the court for decision was, whether there was an offense committed by the defendant "within the boundaries of the State of New York," the crime charged being a statutory offense. In delivering the opinion, Beardsley, J., said: Suydam Sage and Co. were induced by false and fraudulent pretenses to sign certain written instruments, and to part with large sums of money. The fraud may have originated and been concocted elsewhere, but it became mature, and took effect in the City of New York, for there the false pretenses were used with success, the signatures and money of the persons defrauded being obtained at that place. The crime was therefore committed in the City of New York and not elsewhere.[3] Personal presence, at the place where a crime is perpetrated, is not indispensable to make one a principal offender in its commission. Thus, where a gun is fired from the land which kills a man at sea, the offense must be tried by the admiralty and not by the common law courts; for the crime is committed where the death occurs, and not at the place from whence the cause of the death proceeds. And on the same principle, an offense committed by firing a shot from one county which takes effect in another, must be tried in the latter, for there the crime was committed.[4] In such cases the person is an immediate actor in the perpetration of the crime, although not personally present at the place where the law adjudges it to be committed. He is there, however, by the instrument used to effect his purpose, and which the law holds sufficient to make him personally responsible at that place for the act done there." In Reg. v. Leach,[5] a letter containing a false pretense was received by the prosecutor through the post in the borough of C., but it was written and posted in another borough. In consequence of that letter, he transmitted through the post to the writer of the first a post office order for £20, which was received out of the borough. In an indictment against the writer of the first letter for false pretenses, it was held that the venue was well laid in the borough of C. In giving the opinion, Jervis, C. J., observed: "The venue was well laid. The delivery of the letter through the post in the borough, was the making of a false pretense there."

In Reg. v. Jones,[6] money was obtained by means of a false statement of the name and circumstances of the prisoner in a begging letter which reaches the prisoner in County B., but had been transmitted to him in a letter posted at his request in County A. Here it was held that he is liable in A. In the opinion, Alderman, B., cited R. v. Buttery, referred to by Abbott, C. J., in R. v. Burdett, 4 B. & A. 179 (not reported elsewhere), to show that the offense consists in obtaining the money; and observed, that here, when the party solicited put the letter containing the post office order into the post at Sunbury in Middlesex, the post master became the agent of the prisoner and the latter must thus be taken to have received it in Middlesex.

In Regina v. Cook,[7] on an indictment for obtaining

1 1 Bish. on Crim. Procedure, (3rd ed.,) § 53; See Reg. v. Jones, 1 Den. C. C. 551; Temp. & M. 270; 1 Eng. L. and Eq. 533; Norris v. The State, 25 Ohio St. 217; Adams v. People, 1 Comst. 173; People v. Adams, 3 Denio, 190; Reg v. Leech, Dears, 642, 7 Cox, C. C. 100, 36 Eng. L. and Eq., 589; Reg. v. Cooke, 1 Fost. & F, 64.

2 3 Denio (N. Y.), 190.

3 2 R. S. N.Y. 677, § 53; 1 Chit. Cr. Law, (4th Amer. ed.) 191; Rex v. Buttery, mentioned by Chief Justice Abbott in The King v. Burdett, 4 B. & A. 95.

4 Chit. Crim. Law, 155; U. S. v. Davis, 2 Sum. 485.

5 7 Cox C. C. 100; S. C. 36 Eng. L. and Eq. 589; S. C. Dears. 642.

6 Den. B. C. C 551.

7 1 Fost. & F. 64.

money by false pretenses, which in one count was alleged to have been by sending a certain false return of fees to the commissioner of the treasury, it appearing that the return was received by them in Westminster, with a letter dated Northampton, and an affidavit sworn there; and that they, on the faith of it, drew up a "minute," which operated as an authority to the Paymaster-General to pay a certain amount to the prisoner (as compensation), at Westminster, the venue laid being Northamptonshire. The venue was sustained; for, in effect, the money was obtained by means of the minute, being a mere matter of regulation, and not a judicial proceeding. Coleridge, J., remarked (p. 66): "The letter was written and the affidavit sworn in Northamptonshire, and the jury may infer that the documents were posted there. They are material facts in the case, and one of the counts alleges the offense to have been in this, that the prisoner 'forwarded' to the commissioners a representation which was false, and which he certainly may be presumed to have 'forwarded' in Northamptonshire. There is reasonable evidence that it was so."

In Stewart v. Jessup,[8] referred to in the principal case, where the facts are set out, the court said: "It may be assumed, as a general proposition, that the criminal laws of a State do not bind, and cannot affect those out of the territorial limits of the State. Each State, in respect to each of the others, is an independent sovereignty, possessing ample powers, and the exclusive right to determine within its own borders, what shall be tolerated, and what prohibited; what shall be deemed innocent and what criminal; its powers being limited only by the Federal Constitution and the nature and objects of government. While each state is thus sovereign within its own limits, it cannot impose its laws upon those outside of the limits of its sovereign power. Our own Constitution has expressly fixed the boundaries of its sovereignty.[9] And the right of punishment extends not only to persons who commit infractions of the criminal law actually within the State, but also to all persons who commit such infractions as are, in contemplation of law, within the State.[10] Every person being without this State, committing or consummating an offense by an agent or means within the State, is liable to be punished by the laws thereof in the same manner as if he were present, and had commenced and had consummated the offense within the State."[11]

In Commonwealth v. Van Tuyl,[12] the indictment was for obtaining money by false pretense. The fraud was concocted in the State of Ohio, where the representations, which were designed to render it successful, were made, but the scheme was consummated and the money obtained in Kentucky. The defendant was tried and punished in the latter State, the court holding that as the crime was not committed until the money had been obtained, not being mature and taking effect until then, the crime was, therefore, committed in Kentucky and not elsewhere, and the defendant was properly indicted and tried therefor in the county where the money was paid to him. EUGENE MCQUILLIN.

St. Louis, Mo.

8 51 Ind. 413.
9 See Sec. 2, Art. 1 4.
10 2 R. S. 1852, p. 1, § 2.
11 See also Johns v. The State, 19 Ind. 421.
12 1 Met. (Ky.) 4.

BAILMENT—FOR HIRE — NEGLIGENCE — QUESTION FOR JURY.

KINCHELO v. PRIEST.*

Supreme Court of Missouri, June 7, 1886.

1. Whether a bailment was for hire, or merely gratuitous, is purely a question of fact for the jury in each particular case.

2. A gratuitous bailee must exercise the same degree of care and diligence that an ordinary prudent man would in relation to his own business affairs.

Appeal from Scotland circuit court.

Action to recover the value of notes left by plaintiff with defendant's testate for collection, and by the latter held, uncollected, until barred by the statute of limitations. Judgment for defendant, and appeal therefrom by plaintifi.

McKee and *Smoot*, for appellant, James H. Kinchelo.

BLACK, J., delivered the opinion of the court:

The plaintiff, in 1867, before leaving this State, gave to the defendant's testate, Green, 14 notes, and took a receipt therefor, in which it is stated that the notes are to be collected and accounted for. Green died in 1882, and plaintiff filed an account in the probate court, giving a list of the notes, and stating that he did not know whether the notes had been collected; that they could have been collected, and, if not, deceased suffered them to become barred by the statute of limitations; that deceased was to have five per cent. for his services, and that the estate owed him, etc. Three of the notes, signed by Downing and others, and one small one, signed by Green, in all amounting to about $700, were found by the executor among the papers of the deceased, with credits upon the Downing notes. Some correspondence, offered in evidence, shows that, from 1867 to 1882, Green collected and remitted to the plaintiff various sums of money; and the evidence is strong to the effect that he remitted or applied all money collected. Green, in a letter dated in 1867, says Downing had promised payment in the following January. In 1881 he says Downing had promised several times to pay, and expressed some fears about the Arnold note; and in 1882, speaking of this same note, which was signed by Downing, he says he let the date slip out before he knew it, and that Mr. Downing said "a note never dies with him." The real contest is as to the barred notes.

The court, for the plaintiff, instructed the jury, that if deceased, while in the discharge of his trust, negligently permitted the statute of limitations to run against part of the notes, and by reason of said neglect the debts were lost, then the plaintiff was entitled to recover; and refused to instruct that if the notes could have been collected by resorting to legal means, and yet were al-

*S. C. 1 S. W. Rep. 235.

lowed to run until barred, the plaintiff should recover. The court, of its own motion, in substance, told the jury that if deceased, in his lifetime, exercised the same kind of care, in the collection of the notes, that an ordinarily prudent man would have done with his own business affairs, then the verdict should be for the defendant as to the barred notes.

1. There is no doubt but the confidence induced by undertaking services for another is a sufficient consideration for a faithful discharge of the trust. 2 Pars. Cont. (6th ed.) 98—and a depositor makes out a *prima facie* case, even against an unpaid bailee, by showing a deposit made, demand for, and refusal of, the thing deposited. Huxley v. Hartzell, 44 Mo. 370; Wiser v. Chesley, 53 Mo. 547. But this case does not assume that form of action. So far as the barred notes are concerned, it is based upon negligence of the deceased. In all such actions the burden of proof rests upon the plaintiff, and he must prove each material fact necessary to create a liability. Edw. Bailm. § 106.

The first refused instruction asked the court to tell the jury that the written agreement—the receipt—implied a consideration to be received by Green out of the notes to be collected by him. The receipt did not so say, and it was not the proper province of the court to so declare. The evidence must determine whether the undertaking was gratuitous or not, and the jury should take all the circumstances into consideration. The plaintiff does not appear to have made any effort to show that Green was to have any compensation, nor did he seek to have that question submitted to the jury as a question of fact, but relied upon a supposed presumption of law, which does not arise in this case. It is said, in Schouler, Bailm. 35, if the bailee received the thing in the usual course of his business, and business usage, or his known method of dealing with other customers, gave him the right to demand compensation, then the trust, though accepted without express reference to a charge for services, is not to be taken as gratuitous. Further on, the same author says: "But attendant circumstances should be allowed their weight, and where one undertakes, for a near relative or personal friend, or out of mere charity or favor, and more especially if accomplishing the trust puts him to little outlay of time, trouble, and skill, and the bailment lies outside his remunerated field of laber, we may well presume the undertaking to have been gratuitous." And, in Mariner v. Smith, 5 Heisk. 203, where one deposited a quantity of gold, with a firm engaged in the boot and shoe business, and the gold was stolen from the safe of the merchants, it was held to be error to instruct the jury that, if the nature of the bailment was of such a character as to require extraordinary care and responsibility on the part of the bailee, the law will imply a reward.

Here there is no direct evidence that Green received, or was to receive, any compensation. The parties appear to have been personal friends and neighbors. Green was a farmer, and conducted a small country store, and there is no claim that he in any way assumed to be a collecting agent. These facts all tend to show that the undertaking was gratuitous. If the plaintiff desired to put the case before the jury on the theory that Green was a paid agent, he should have asked the court to submit that question to the jurors as a question of fact; but it is evident no such a claim was made, or intended to be made, on the trial, save by way of a presumption of law. The instruction was properly refused.

In Edwards on Bailments, § 77, it is said: "And there is a class of cases in which, without any delivery of goods or property, an unpaid agent is held responsible for the use of diligence in the business he undertakes; as where a man receives a demand to collect gratis * * * The effort to collect must be made with ordinary diligence. This is stated to be the rule in this class of cases in Newell v. Newell, 34 Miss. 385, which is a case in some of its features resembling the present one. The degree of care which the court required of the deceased, in the collection of the notes, was the same kind of care that an ordinarily prudent man would have used with his own business affairs. This stated the rule favorably to the plaintiff. Nothing appears to have been said in the evidence as to the solvency of the makers of the notes, though it was probably assumed on trial by both parties to the suit, that something could have been made out of Downing by suit. There is no claim of want of good faith on the part of the deceased. The instruction presented the case fairly enough.

2. There was no error in allowing the defendant to read, in evidence, a note, made by plaintiff to Green, for $300, dated in 1859, and found also among the papers of the deceased. It would have been natural, and in the ordinary course of affairs, for Green to have applied collections in payment of this note. One party being dead, and the other thereby rendered incompetent to testify, it was proper to resort to any circumstances having a tendency to shed light upon the particular transaction in question.

The judgment is affirmed.

WEEKLY DIGEST OF RECENT CASES.

1. ACCORD AND SATISFACTION.—*Acceptance of an Admitted Balance—Condition.*—Defendant and plaintiff had an unsettled disputed account. Defendant sent plaintiff a statement of the account as it claimed to be, to which plaintiff made no reply. Defendant then sent the statement, accompanied with its note to cover the admitted balance, and a letter in which it stated that the note covered the balance due, and hoped it would be satisfactory. The plaintiff replied to this letter, giving its version of the disputed items, but kept and used the note, which was paid at maturity. *Held* that, as there was no condition attached to the acceptance of the note for the admitted balance, it was not an accord and satisfaction of the debt. *Boston Rubber Co. v. Peerless etc. Co.*, S. C. Vt. Aug. 11, 1886. 5 Atl. Rep. 407.

2. ASSIGNMENT.—*Compromise — Attorney — Judgment.*—A debtor holding a claim against a third person may deliver it into the hands of his creditor and authorize suit to be brought upon it in his own name for the benefit of such creditor. Authority to prosecute a suit does not involve authority to compromise it. Before an attorney can compromise a suit he must have special authority. If a judgment be entered where no indebtedness actually exists, such judgment cannot be used for the purpose of effecting a redemption. A decree for deficiency, entered after a sale on mortgage foreclosure, for the amount remaining due and unpaid on the mortgage after applying the proceeds of the sale, does represent an actual existing indebtedness, and may be used to redeem. *Wetherbee v. Fitch*, S. C. Ill. May 15, 1886. 4 West. R. 220.

3. ———. *General Assignment for Creditors—Partial Assignments for Creditors.*—To constitute a general assignment of a debtor's property for the benefit of creditors, within the meaning of the Acts of 1881, Ch. 121, the fact that it is a general assignment of all the debtor's property must appear on the face of the deed or the sworn inventory required to be annexed, and in that event only will the assignee be entitled to any other property of the debtor not described in the deed or set out in the inventory. A conveyance of a portion of the debtor's property for the benefit of one or more, or all his creditors is good to the extent of the property included therein if not made within three months of a general assignment, and a mortgage or trust deed to secure the price of property bought, or money loaned at the time is good, even if executed within three months of a general assignment. *Hays v. Covington*, S. C. Tenn. June 12, 1886. 2 So. Law Times, 325.

4. ———. *General Assignment for Creditors—Schedule under oath Indispensable.*—The fouth section of the Act of 1881, providing that "The debtor making a general assignment shall annex thereto a full and complete inventory or schedule under oath, of all his property of every description, etc.," is mandatory and absolutely indispensable to the validity of the deed of assignment. The failure to comply makes the deed fraudulent on its face. *Hill Fontaine & Co. v. Alexander*, S. C. Tenn. May 8, 1886. 2 So. Law Times, 330.

5. ATTORNEY AND COUNSELOR.—*Relation to Client, when Arises.*—Where an attorney at law is, as such, called upon for "legal advice" by a person acting for himself, and he thereupon assumes to give a professional opinion in relation to the matter as to which he is consulted, the relation of attorney and client arises between him and the person so consulting him. *Ryan v. Long*, S. C. Minn. July 9, 1886. 29 N. W. Rep. 51.

6. ASSIGMENT.—*Contempt—Admissions of Solicitor in Contempt Proceedings—Not Binding on Client—Assignment for Benefit of Creditors—Wife Regarded as amy Third Person—Suit to Set Aside Fraudulent Convegance—Receiver—Creditors must Move through Receiver—Impleading Receiver—Leave of Court must be Obtained.*—In a proceeding as for a contempt, to enforce a civil remedy, a solicitor has no authority to make admissions for his clients,and defendants can only be bound by written admissions, made a part of the record, and examinable on appeal. When there is an assignment for the benefit of creditors by the husband, and a proceeding to attach certain of his wife's property, alleged to have been obtained by fraud, the wife stands in the litigation like any third person; Husband and wife are not mutually responsible for each other's conduct, and if either is chargeable, it must be individually. Creditors cannot attach the interest of third parties, alleged to have been obtained by fraud, until they have obtained a standing by legal proceedings, and when there is a general assignment for the benefit of creditors the remedy is only given to the assignee or receiver. Where a receiver has been appointed, it is contrary to law to allow any one else to implead him in the same proceeding without leave of the court, or to take out of his hands the control of the proceedings. *Scott v. Chambers*, Wayne Circuit Judge, S. C. Mich. July 21, 1886. 29 N. W. Rep. 92.

7. CONTRACT.— *Consideration — Promise to Pay Judgment—Extension of Time.*— Where a judgment debtor, in consideration of an extension of time, and the forbearance of execution, promises verbally to pay the balance of such judgment, such consideration is sufficient, and the promise so made is binding, and the creditor may maintain special *assumpsit* thereon. *Fraser v. Backus*, S. C. Mich. July 21, 1886, 29 N. W. Rep. 92.

8. ———. *Construction.*—A promissory note being a written contract, it is to be construed by the court. It is in law the contract of the maker, and the ruling that defendant might show by oral testimony that it was the note of another, violated the settled rule of law that a written contract cannot be controlled or varied by oral testimony. *Davis v. England*, S. J. C. Mass., May 8, 1886, 2 N. Eng. Rep., 371

9. ———. *Corporation—Ultra Vires.*—1. Although a contract made by a street railway company to build its road may have been *ultra vires*, yet where it has been fully executed on the part of the one contracting with the company, and for nearly ten years the company has held, enjoyed and taken the fruits of the contract, it is estopped to deny its validity. In order to make a valid ratification, it is sufficient if it is made with the full knowledge of all the material facts; and an instruction which adds a new element, namely: that the principal must have known, not only all the facts, but also the legal effect of the facts, and then, with a knowledge of both law and facts, ratified the contract, is erroneous. Where the circumstances of the case were such as to render the inference of ratification natural and easy, it was error to instruct the jury that, on all the evidence, they would not be warranted in finding a ratification. As a general rule, a contract between a corporation and its directors is not absolutely void, but voidable at the election of the corporation. The right to avoid it may be waived, and it does not necessarily require any independent and substantive act or ratification; but may become finally established as a valid contract by acquiescence; and such acquiescence may be inferred from the acts of the corporation during a long period of time. *Kelley v. Newburyport, etc. Co.*, S. J. C. Mass., May 6, 1886, 2 N. Eng. Rep. 383.

10. CORPORATIONS. — *Statute of Limitations Length of, and when Active against Stockholder.* —When a judgment is obtained in Mississippi, against a private corporation organized under the laws of Alabama, and a bill in equity is filed here to enforce payment out of the unpaid stock of the corporators, the statute of limitations is twenty years, although the original demand was governed by the statute of six years. The statute of limitations does not begin to run in favor of the stockholders, as against the creditors of the corporation, until calls for stock have been made by the directors, or by a court of equity at the instance of creditors. *Brown v. Grangers' Life and Health Ins. Co.*, S. C. Ala., Dec. Term, 1885-86.

11. CRIMINAL LAW.—*Trial—Instruction—Enumeration of Elements of a Crime — Instruction — Jury should Consider Court's Instructions—Witness—Accused as Witness—Credibility.*—While an instruction purporting to state all the elements of an offense necessary to a conviction may be fatally defective if an essential element is omitted, yet where the instruction simply enumerates certain things that the prosecution must prove, without stating that they of themselves are sufficient, and the other requisites are given in another instruction, there is no error. It is not error to instruct a jury in a criminal case that, while they are the judges of the law as well as the evidence, if they are in doubt as to the law, they "should give the court respectful consideration." An accused who goes upon the stand has a right to put his evidence before the jury unprejudiced by adverse criticism of the court, and an instruction calling attention to his interest, and stating that, to have a controlling weight, his testimony should be consistent with other facts and circumstances in evidence, is erroneous. *Bird v. State*, S. C. Ind., June 22, 1886, 8 N. E. Rep., 14.

12. DEED.—*Acknowledgment — Necessity for, and Effect of—Partition—Tenant in Common not in Possession—Joint Tenants and Tenants in Common—Ejectment.*—Conveyances are acknowledged for purposes of registration merely, while, as between the parties thereto, and all persons having actual notice thereof, deeds are good without any form of acknowledgment whatever. A tenant in common who is not in actual possession, and whose title is denied by his co-tenants, cannot maintain partition in equity. Ejectment is the only proper remedy for a tenant in common who is not in actual possession, and whose title is denied by his co-tenants. *Criscoe v. Hambrick*, S. C. Ark., June 26, 1886, 1 S. W. Rep. 150.

13. ———. *Delivery—Amendment.*—Delivery is essential to give effect to a deed; but delivery depends on the grantors's intention, and intention is a fact to be found by the trier; thus, a recorded deed was declared void, where the master found that the grantor merely left it in the possession of the grantee, but that she never delivered the deed, *i. e.*, as an operative conveyance. The orator was allowed to amend his bill, brought to set aside a deed, by adding to it as a cause the non-delivery of the deed. *Dwinell v. Bliss*, S. C. Vt., Aug. 2, 1886, 6 East Rep. 324.

14. EVIDENCE. — *Instruction — Negligence — Diligence.*—The credibility of oral testimony being a question for the decision of the jury, a charge is erroneous which assumes, or states as fact, any material matter which depends on the sufficiency of the oral testimony for its establishment; yet, where the record affirmatively shows that certain facts were admitted, or were clearly proved and not disputed, they may be stated without hypothesis. Charges must be construed in connection with the evidence; and if, when so construed, it is free from error, though it assert a rule which, when applied to a different state of proof, would not be correct, it is no ground of reversal. Negligence, as a cause of action or as a defense, must be the proximate cause of the injury complained of; and when contributory negligence is set up as a defense, it is an admission of negligence on the part of the defendant. Diligence is a relative term, and has not always the same measure; and a charge which instructs the jury that the law ordinarily requires the same diligence from the driver of a carriage and a person on foot in a public street or road, is erroneous. A mere conflict in the testimony—as where one witness testifies that he heard one of the parties make a certain declaration, while others who were present at the time testify that they did not hear it—does not authorize a charge to the jury as to the effect to be given to the testimony of a witness who has sworn falsely in one particular. A party is not bound to produce all the witnesses who may know something about the transaction involved in the issue, nor is any presumption indulged against him on account of his failure to produce them, though, when a witness possesses peculiar knowledge, supposed to be favorable to the party who can produce him, his failure to produce such witness, if unexplained, is ground of suspicion. A charge which is correct as applied to the particular case, though stating a general principle too broadly, or which has a tendency to confuse or mislead the jury, is not a

reversible error; but such a charge may properly be refused. When a charge asked and refused is ambiguous, or susceptible of two constructions, that construction will be adopted which is least favorable to the party asking it. *Carter v. Chambers*, S. C. Ala., Dec. Term, 1885-6.

15. EVIDENCE—*Reputation Former Admissible—Rule as to*—Mynatt resided in Johnson county for a number of years, but for four years preceeding the trial, he had resided in a different county, on the trial, several witnesses who had resided in Johnson county and had known Mynatt there, after qualifying themselves to testify to Mynatt's reputation while residing in Johnson county, were permitted to testify that his reputation for truthfulness while he resided there was bad. Objected to on the ground that the witnesses could not state the reputation of Mynatt at the time they testified. *Held*, That the objection was not good; that his former reputation, considering the time he had resided in a different neighborhood, and his mature age at the time he lived in Johnson county, were facts which the jury might consider in determining whether his evidence was entitled to credence. The law does not presume, under these circumstances, that a person of mature age had reformed so as to acquire a different reputation. *Mynatt v. Hudson*, S. C. Tex., Austin Term, 1686; 1 Tex. Ct. Rep. 696.

16. ——. *Written Contract—Modification of, by Parol—By New Agreement With New Consideration—Instruction.*—The rule that parol evidence is inadmissible to add to or vary the terms of a written contract precludes evidence of the negotiation which preceded, or conversation which accompanied, the making of it, unless necessary to explain ambiguous provisions, the meaning of which cannot be ascertained with certainty by an inspection of the written instrument. A written contract may be modified by a subsequent new and distinct oral agreement upon a new consideration, but in this case the oral evidence of the bargain, and of the explanation accompanying the execution of the written contract, instead of showing a modification of the writing, tends to show simply that the writing never expressed the real agreement of the parties, and plaintiff allowed it to stand unaltered, on the assurance of Martin that a delivery of a certain less number of brick per month would be accepted in lieu of the number called for by its terms. *Held*, that the court erred in refusing to charge that what took place between the parties previous to or at the time of the execution of the written contract was inadmissible to vary or modify it, and that a new agreement must be shown. The court also refused to charge that if the evidence on which the alleged modification of the written contract depends, is only of what took place contemporaneous with the execution of the written contract, then no modification was shown. *Held* error. *Corse v. Peck*, N. Y. Ct. App., June 1, 1886; 7 N. East. Rep. 810.

17. EXECUTION—*Sale—Waiving Defects—Notice—Statute.*—The acceptance and retention by an execution debtor of the surplus realized from the judicial sale of his real estate amounts to a waiver on his part of all irregularities in an otherwise voidable sale. A statute requiring the sheriff to give notice of execution sale, and prescribing the manner thereof, is directory merely, and his neglect to follow literally the statutory directions will not invalidate the title of an innocent purchaser. *Huffman v. Gaines*, S. C. Ark., June 26, 1886; 1 S. W. R. 100.

18. FRAUD—*Statute of Frauds—Guaranty Embodied in Lease—Consideration.*—Where a contract of guaranty is entered into contemporaneously with the principal contract, and is either incorporated in the latter, or so distinctly refers to it as to show that both agreements are parts of an entire transaction, the statute of frauds does not require a consideration to be expressed in the guaranty distinct from that expressed in the principal contract. This principle applied to a guaranty embodied in a written lease. *Highland v. Dresser*, S. C. Minn., July 1, 1886; 29 N. W. Rep. 55.

19. ——. —— ——. *Leasehold Interests.*—Contracts for the sale of leasehold interests, although technically only chattel interests, are within the statute of frauds, and therefore an oral contract which is entire, and includes a sale of buildings and machinery, and of the leasehold interest, is within the statute. The English and Rhode Island statute compared. The omission in the Rhode Island statute, of the words, "or any interest in or concerning them," does not change its meaning. See also, Pub. St. R. I., c. 24, § 9. *Potter v. Arnold*, S. C. R. I., 1886; 5 Atl. Rep. 379.

20. HUSBAND AND WIFE—*Wife, Creditor of Husband—Creditor's Action by Wife—Res Adjudicata—Evidence Necessary to Make Case—Subsequent Divorce—Effect of—Lien on Judgment.*—Plaintiff recovered five judgments in county court against John Carpenter, her husband, for installments of income due her on articles of separation, in which she had agreed to support herself, and sign all deeds; he to pay her a stated sum each month. Upon the trial of the several actions the validity of the agreement of separation, and the *status* of plaintiff as a creditor of her husband, was litigated between the parties thereto, and was in each action decided in her favor. In this action to set aside as fraudulent, certain conveyances of real estate executed by him to defendants, *held*, that the questions were *res adjudicata*, and defendants were precluded from raising them in this action. That the plaintiff, by putting in evidence the judgment rolls, the executions returned unsatisfied, and the agreement of separation, and proving that the conveyances assailed were voluntarily made with intent to defraud his creditors, with the knowledge of the grantees, made a case which justified the court in rendering judgment for her. The plaintiff had, subsequent to the separation, procured a decree for an absolute divorce from her husband, with no provision for her support. *Held*, that this did not affect her pecuniary claims on him, if secured by legal obligations, either for dower or to an allowance by way of alimony. The court below declared the judgment to be a lien upon the land in question for the several installments due, but not in judgment when the action was commenced. *Held*, error; that the court was limited to the installments in judgment, and that this judgment should be corrected to that extent. *Carpenter v. Osborne*, Ct. of App. N. Y. June 15, 1886; 1 N. East. Rep. 823.

21. INSURANCE—*Fire Insurance Policy—When it Becomes a Liquidated Demand—City Ordinance Becomes Part of the Insurance Contract.*—When a building insured is so destroyed by fire as that it ceases to be within the meaning of the law

building, then, under Revised Statutes, Art. 2971, the policy evidences a liquidation against the company issuing it for the full sum for which the policy was issued. Where the parties contracted in view of a city ordinance which prohibited the reconstruction or repair of a wooden building, situated in the fire limits of the city, destroyed by fire to the extent of one-third its value, unless by leave of the common council, and this leave had been refused, the fire must be deemed the proximate cause of the loss, and the loss total. *Hamburg, etc. Co. v. Carlington*, S. C. Tex. Austin Term, 1886; 1 Tex. Ct. Rep. 698.

22. JURISDICTION — *Federal Jurisdiction — State Decisions—Public Officers—De Facto—No Office Existing — Agency— Ratification— Original Authority.*—The federal courts will follow the decisions of the State tribunals in the construction of its constitution and laws, where no federal question arises, and no principle of commercial or general law is impaired. There can be no authority to act as a public officer *de facto*, where there could be no such officer *de jure* by reason of the nonexistence of the office. No ratification can be affected of the act of an alleged public body which was not capable to act for the community; ratification presumes some original authority. *Norton v. Shelby County*, S. C. U. S. May 10, 1886; 22 Rep. 193.

23. LIEN.—*Will—Laches.*—Where a person's money is invested in land without his consent he may have an equitable lien on the land for its repayment; but where he has full knowledge and notice that his money formed a portion of the purchase price of the land, his silence during many years, after notice of the investment of his money, will defeat his right to the lien on the property purchased therewith. Where the owner of the property purchased partly with money of another dies testate and bequeathes the property to another, and a certain sum of money to him who furnished part of the purchase price, the latter's silence after he had knowledge of the provisions of the will is decisive. By his own laches he has deprived himself of any right or benefit which he might have had if he had exercised proper diligence. Where his silence had induced the devisee in remainder to believe that plaintiff fully acquiesced in the provisions of the will, it is now too late to set up any claim he might have had to the estate if in season he had insisted upon it; and he is entitled only to the bequest named in the will. *McGivney v. Mc Givney*, S. J. C. Mass. June 30, 1886. 2 N. Eng. Rep. 533.

24. MERGER.—*Trust—Particular Estate—Reversion.*—Where a corporation, while holding a leasehold interest in land in trust to be used for church purposes, takes a conveyance from the reversioner, there is a complete merger, the trust is extinguished, and a subsequent deed from such corporation conveys the fee. *Bennet v. Methodist etc. Trustees*, Ct. App. Md. June 24, 1886. 5 Atl. Rep. 291.

25. MORTGAGE.—*Chattel Mortgage—Crops to be Grown on Land of Mortgagor—Registration—Notice.*—Minnesota Linseed Oil Co. v. Maginnis, 32 Minn. 193, S. C. 20 N. W. Rep. 85, followed, as to the validity of a chattel mortgage of crops to be grown upon land in the possession of the mortgagor. Under sections 2, 3, c. 39, Gen. St. 1878, as the former section is amended in chapter 38, Laws 1883, a chattel mortgage on crops to be grown on land of mortgagor, when filed in the proper office in the town, city, or village in which the land upon which the crops are to be grown lies, is full and sufficient notice to all persons interested, of the existence and conditions thereof. *Miller v. Chappel*, S. C. Minn. July 9, 1836; 29 N. W. Rep. 52.

26. ———. *Foreclosure.*—Where a mortgage or deed of trust is but an incident to the debt which it is given to secure, and can have no existence as an obligation or conveyance independently of the debt, but is merely an aid or instrumentality in the collection of the debt, a statute of limitations which bars the debt, bars the right to foreclose the mortgage also. It is not necessary that mortgages or deeds of trust should be named in the statute. (Hyman v. Bayne, 83 Ill. 256, and Gridley v. Barnes, 103 Ill. 216, followed.) *McMillan v. McCormick*, S. C. Ill. May 15, 1886. 4 West R. 210.

27. ———. *Foreclosure—Parties—Adverse Claimant —Prior Fraudulent Conveyance.*—Upon a petition to foreclose a mortgage the mortgagee cannot make an adverse claimant to the estate a party defendant for the purpose of trying such adverse claim, when there is no privity between the mortgagee and the claimant. The petition alleged that the mortgagor, prior to the execution of the mortgage, conveyed the premises to A., without consideration, to shield the property from attachment by the creditors of the mortgagor. *Held*, that the prior deed being good as between the parties by R. L. § 4155, could not be attacked by petition to foreclose such subsequent mortgage. *Kinsley v. Scott*, S. C. Vt. Aug. 7, 1886. 5 Atl. R. 390.

28. ——— ———. *Sale—Notice—Affidavit of Publication*—An affidavit of the publication of a notice of a mortgage sold in foreclosure proceedings, by advertisement, was made by appending to a copy of the notice, as originally published, a copy of a notice of adjournment, stating that "the foregoing sale is adjourned until the sixth day of October, 1864." The original notice designated September 29, 1864, for the sale. To these copies an affidavit was appended, stating that "the above notice of mortgage foreclosure sale" was printed for the period of six weeks, "the last publication being made on the twenty-eighth day of September, 1864; and that said notice of adjournment of said sale was printed and published in said paper on Wednesday, the fifth day of October, 1864." The sale was made on the sixth day of October. This affidavit, being received in evidence as proof of the publication, construed as showing the publication of the fifth day of October of only the notice of adjournment, and not of the original notice also; and, the notice of adjournment not containing all the essential requisites of a notice of sale, the publication so made was insufficient to authorize a sale. Such proof considered as overcoming any *prima facie* evidence of the regularity of the notice which may attach to the sheriff's certificate of a sale by virtue of chapter 112, Gen Laws 1883. *Sanborn v. Potter*, S. C. Mich., July 15, 1886. 29 N. W. R. 64.

29. PARTNERSHIP—*Dissolution by Death—Powers and Liability of Survivor.*—On the dissolution of a partnership by the death of one of its members, the surviving partner is entitled to the exclusive right of possession of the partnership property, and the courts will not interfere with his management so long as he continues faithful to his trust;

but he holds the assets as a *quasi* trustee, first, for the partnership creditors, and afterwards for the personal representative of the deceased partner; and if he is guilty of waste, negligence, misconduct, or other violation of his trust, a court of equity will often intervene to afford relief. *Farley Spear & Co. v. Moog*, S. C. Ala. Dec. Term, 1885,-86.

QUERIES AND ANSWERS.*

[*Correspondents are requested to draw up their answers in the form in which we print them, and not in the form of letters to the editor. They are also admonished to make their answers as brief as may be.—Ed.*]

QUERIES.

21. A., a farmer bequeathed to his widow, B., a life estate in his land; at her death the land itself to go to C., his illegitimate nephew, no proviso empowering B. to sell the land if C. died intestate first. C. died 17 years before B., who executed a deed and sold it, though she had merely a life estate. Properly the land would escheat to the Government—if so, would the courts or President cause her deed to be cancelled and the estate sold for benefit of the Government? J. C. H.

QUERIES ANSWERED.

Query 50 [22 Cent. L. J. 576].—Please answer as soon as practicable through your LAW JOURNAL, the following query in view of Kentucky laws. The charter of the town B., gives to the officers thereof the power to pass ordinances; requiring the property owners along the streets of said town to curb and pave the side-walks in front of their property. The charter further provides that upon the failure of the property holder to so curb and pave, the town "may" have said curbing and paving done, and thereby obtain a lien for the cost of said pavement upon the property in front of which said curbing, etc. was erected. Query: If said town pass the ordinance aforesaid, directing A. B. & C. to curb and pave in front of their property, and C., living upon the same street with A. and B., but nearer to the out-skirts or limits of the town, in obedience to the ordinance, did curb and pave the side-walk in front of his property. Is C. entitled to a mandamus requiring the town to so curb and pave in front of the property of A. and B.? Give authorities. H. P. C.

Answer.—This matter is reached by a mandamus. Rock v. Newark, 33 N. J. L. 129. The town has no right to refuse the performance of the law against a party having an interest in such a performance. Martin v. Mayor of Brooklyn, 1 Hill, 545. An ordinance in force is as much a law as an act of the legislature, and the latter, they were obliged to carry out. People v. Common Council of Brooklyn, 22 Barb. 404. Where they had decided on the act, and parties had acted under that idea, they were compelled to continue their proceedings. In the matter of Beekman St., 20 John. 269. Mandamus will lie. M.

RECENT PUBLICATIONS.

FEDERAL DECISIONS.—Cases Argued and Determined in the Supreme, Circuit and District Courts of the United States. Comprising the opinions of those courts from the time of their organization to the present date, together with extracts from the opinions of the Court of Claims, and the Attorneys-General, and the opinions of general importance of the Territorial Courts. Arranged by William G. Myer, author of an Index to the United States Supreme Court Reports; also indexes to the Reports of Illinois, Ohio, Iowa, Missouri and Tennessee, a digest of Texas Reports, and local works on Pleading and Practice. Vol. XV. EQUITY—ESTATES. St. Louis, Mo.: The Gilbert Book Company. 1886.

It is perfectly superfluous for us to add anything with reference to this volume to the commendation which we have so recently and so frequently bestowed upon its predecessors that have been so rapidly issued from the press by the indefatigable publishers. This volume is in all respects equal to the high standard of the general work, and that it is one of the most important of the whole series, is manifest from two words which appear on its title-page—Equity, Estates.

JETSAM AND FLOTSAM.

A LESSON IN TEMPERANCE.—Just as Justice Coldbath gave the fat man in a short coat thirty days for keeping a calf, three pigs, and a swarm of chickens in his front yard, a citizen in good clothes came into court. That is, his clothes were good what was left of them. They were torn in a dozen varieties of rent, and dabbled with mud and blood. His broken head was bandaged, his hat was crushed, his face disfigured. O, but old Justice Coldbath was mad. "Well, sir," he snarled, before the citizen could speak, "it's easy enough to see what's the matter with you!" The citizen drew a sigh that sounded like a November breeze, and shook his head despondingly. "Same old story," said the justice; "same old thing. You look like a respectable man now, don't you! You are respectable when you are fixed up, I dare say. Merchant, aren't you. Yes, I knew it. Church member, more'n likely? Yes, I thought so. Stand well in society, and never slipped up before? Yes, sir, I know you. I can pick out your case every time it comes before me. Whisky, eh? Liquor's the trouble. That's what plays the mischief with your respectable drinker, sir. Brings him to the gutter just as sure as it does the tramp. Now, sir, I'm going to reform you. I'm going to deal justly and harshly and mercifully with you for your own sake. I'll sock it to you, so that you'll never come here again. It's whisky, you say?" "Yes, sir," said the citizen, feebly; "whisky is the trouble, sir. But for whisky I wouldn't appear in this disgraceful, forlorn, painful position. But for whisky, I would be a sound, happy man, in good, clean clothes, and no headache. But for whisky——" "That'll do," said the justice, "I know the whole story, and am glad you realize your situation so keenly. Maybe your contrition will take twenty days and $10 off your sentence, and maybe it won't. Now, then, how much whisky did you drink, and where did you get it?" "Me!" the citizen said, in a faint tone of infinite surprise, "I never touched a drop of intoxicating liquor in all my life. I am pastor of Asbury M. E. Church, and a drunken policeman assaulted me on the street half an hour ago and nearly clubbed me to pieces. I have just come to file information and get a warrant for his arrest." And old Justice Coldbath, who is never so happly as when delivering a temperance lecture from the bench to a battered inebriate, was so mad at having his lecture spoiled, that he tried the minister on three charges of conspiracy, malicious mischief, and contributory negligence, with intent to deceive and commit fraud, before he would let him go and then he tried to saddle the costs upon him.